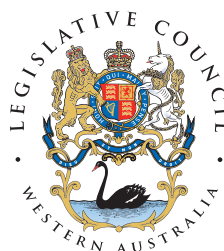


**41ST PARLIAMENT**



## **Report 3**

# **JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

*Annual Report 2022*

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Presented by

Mr Geoff Baker MLA (Chair)

and

Hon Lorna Harper MLC (Deputy Chair)

March 2023

## **Joint Standing Committee on Delegated Legislation**

### **Members as at the time of this inquiry:**

Mr Geoff Baker MLA (Chair)

Mr Stuart Aubrey MLA

Hon Stephen Pratt MLC

Dr Katrina Stratton MLA

Hon Steve Martin MLC (from 23 November 2022)

Hon Lorna Harper MLC (Deputy Chair)

Hon James Hayward MLC (until 20 October 2022)

Hon Martin Pritchard MLC

Ms Christine Tonkin MLA

### **Staff as at the time of this inquiry:**

Alex Hickman, LLB (Advisory Officer (Legal))

Sophia Simpson (Committee Clerk)

### **Address:**

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au) Website:

[www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)

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# EXECUTIVE SUMMARY

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## Introduction

- 1 This report summarises the work of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January 2022 and 31 December 2022 (Reporting Period).
- 2 The Committee's role is to scrutinise, on behalf of the Parliament, instruments made under statutory delegation by:
  - the Governor in Executive Council
  - Ministers
  - statutory bodies
  - local governments.
- 3 The Committee determines whether instruments are within power of the authorising primary legislation or otherwise in breach of the Committee's terms of reference.<sup>1</sup>

## Committee activities

### *Scrutiny of delegated legislation*

- 4 In the Reporting Period, 329 instruments were gazetted, including 163 regulations, 99 local laws and 26 rules.
- 5 The Committee only recommends the Parliament disallow delegated legislation as a last resort. Motions to disallow an instrument will not proceed if the Committee receives undertakings to amend or repeal the instrument. During the Reporting Period, the Committee received departmental (Ministerial) undertakings covering 3 instruments and local government undertakings covering 24 local laws.

### *Other activities*

- 6 The Committee participated in a Local Laws Working Group meeting on 9 March 2022.

## Scrutiny of regulations

- 7 A regulation enabled the Electricity Licensing Board (ELB) to delegate any of its powers and duties under the *Energy Regulations Amendment (Electricity Licensing) Regulations 2022* other than:
  - its power of delegation
  - any power the Director of Energy Safety has delegated to it.
- 8 The Committee considered the *Electricity Act 1945* did not authorise the ELB to do so. The Minister for Commerce undertook to delete the regulation.
- 9 The Committee also scrutinised the principal regulations supporting the *Work Health and Safety Act 2020*. These comprised over 1,500 pages in 3 volumes of the *Government Gazette*.
- 10 The Committee commends departments, other agencies and Parliamentary Counsel's Office on the quality of drafting of the instruments it scrutinised in the Reporting Period.

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<sup>1</sup> The Committee's terms of reference appear on the back inside cover of this report.

### **Scrutiny of local laws**

- 11 The Committee obtained 24 undertakings from local governments to amend their local laws to address specific issues identified. These included cat local laws which were not authorised by the *Cat Act 2011*.
- 12 Ten of the undertakings facilitated amendments to ensure the local laws were within power of the *Local Government Act 1995*.
- 13 The Committee also obtained undertakings to correct drafting errors.

# 1 Introduction

## Overview

- 1.1 The Joint Standing Committee on Delegated Legislation (Committee) holds a standing referral from the Legislative Assembly and Legislative Council to consider instruments of delegated legislation published in the *Government Gazette*.<sup>2</sup> Like its predecessors, the Committee in this 41<sup>st</sup> Parliament considers only:
  - instruments that are subject to parliamentary disallowance<sup>3</sup>
  - instruments noted by an individual Member.
- 1.2 The majority of the instruments considered are regulations made by the Governor in Executive Council. Others include local laws made by local governments, court rules, by-laws, planning schemes, orders, notices, plans and other variously-named instruments made by a range of persons or bodies.
- 1.3 This report:
  - summarises the work of the Committee between 1 January 2022 and 31 December 2022 (Reporting Period)
  - discusses some notable instruments considered by the Committee
  - comments on significant issues arising from the Committee's scrutiny of instruments.

## Terms of reference

- 1.4 The Committee's terms of reference (TOR) were adopted by the Parliament on 25 May 2021, when the Committee was established.<sup>4</sup> They are on the back inside cover of this report.
- 1.5 The Committee operates under the Standing Orders of the Legislative Council.
- 1.6 The Committee considers whether an instrument complies with requirements set out in item 10.6 of its TOR. These include whether the instrument is 'within power' or 'contains only matter that is appropriate for subsidiary legislation'.

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<sup>2</sup> Either under section 41(1)(a) of the *Interpretation Act 1984* or another written law: Term of Reference 10.5: *Standing Orders of the Legislative Council*, schedule 1, cl 10.5.

<sup>3</sup> Pursuant to section 42 of the *Interpretation Act 1984* or another written law.

<sup>4</sup> Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, [\*Parliamentary Debates \(Hansard\)\*](#), 25 May 2021, pp 670-1.



## Committee members

1.7 The front inside cover of this report lists Committee Members during the Reporting Period.<sup>5</sup>

Figure 1. *Committee members in 2022*



Left to right: Dr Katrina Stratton MLA; Mr Stuart Aubrey MLA; Hon Lorna Harper MLC (Deputy Chair); Hon Stephen Pratt MLC; Mr Geoff Baker MLA (Chair); Hon James Hayward MLC; Hon Martin Pritchard MLC; Ms Christine Tonkin MLA.

## Committee process

1.8 The Committee writes to the relevant Minister or local government President or Mayor when it requires further information to assist in its scrutiny of an instrument. In many instances, the responses received address the Committee's questions and no further action is taken.

1.9 When the Committee considers that:

- a clause or clauses in the instrument offend its TOR and/or
- there are procedural issues in the making of the instrument

it usually requests an undertaking from the responsible Minister or local government for its amendment or repeal.

1.10 The responsible Minister or local government usually undertakes to amend or repeal the instrument within six months of the date of the undertaking. The Committee monitors whether undertakings have been fulfilled within the agreed timeframe.

1.11 The Committee awaits the response to questions or its request for undertakings on an instrument. It is often necessary to authorise a Committee Member to give notice of a motion to recommend disallowance of the instrument in the Legislative Council.<sup>6</sup> This is to:

- protect the Committee's right to recommend disallowance of the instrument
- provide the Committee with additional time to scrutinise the instrument and, if necessary, obtain further information.

<sup>5</sup> The Legislative Council discharged Hon James Hayward MLC from membership of the Committee on 20 October 2022 and appointed Hon Steve Martin MLC to the Committee on 23 November 2022.

<sup>6</sup> The Legislative Council has procedures for dealing with motions for disallowance, including motions placed by the Committee: refer to Standing Orders of the Legislative Council, standing order 67.



- 1.12 Notice of a motion to recommend disallowance must be given within 14 sitting days after the instrument is tabled in the Parliament.<sup>7</sup>
- 1.13 Most of these notices of motion<sup>8</sup> are later discharged from the Legislative Council Notice Paper following receipt of satisfactory responses from Ministers and local governments.<sup>9</sup>
- 1.14 As a last resort when agreement cannot be reached, the Committee reports to the Parliament recommending the disallowance of an instrument.
- 1.15 The motion is then debated by the Legislative Council, which may vote to disallow the instrument.

### Undertaking lists

- 1.16 The Committee posts the following lists of undertakings on its webpage ([www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del)):
- departmental undertakings (undertakings provided by Ministers, government departments, agencies and statutory authorities)
  - local government undertakings.
- 1.17 These lists inform stakeholders of issues the Committee has raised and assist departmental and local government officers in drafting delegated legislation. In particular, the local government undertakings list allows local governments and their advisers to identify systemic problems in local laws.

### Acknowledgements

- 1.18 The Committee relies on the assistance of relevant Ministers, departments, statutory bodies and local governments in scrutinising a large volume of delegated legislation within time constraints. The Committee thanks Ministers and people who provided that assistance during the Reporting Period.
- 1.19 In particular, the Committee thanks:
- the Department of Local Government, Sport and Cultural Industries (DLGSC)<sup>10</sup>
  - the Western Australian Local Government Association (WALGA).<sup>11</sup>

## 2 Committee activities in 2022

### Volume and nature of work

- 2.1 The Committee held 14 meetings in the Reporting Period.

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<sup>7</sup> *Interpretation Act 1984* s 42. Note that other Acts may provide for a different period during which Notices of Motion to disallow delegated legislation may be given.

<sup>8</sup> Which usually become motions to disallow on the third sitting day after they have been moved: *Standing Orders of the Legislative Council*, standing order 67(3).

<sup>9</sup> The statistics relating to this practice are contained in Table 1 on page 4.

<sup>10</sup> The DLGSC acts as a valuable filter in dealing with problematic local laws, resolving many issues before the local laws are formally made, gazetted and then referred to the Committee.

<sup>11</sup> WALGA is another valued source of local laws information and expertise for local governments.

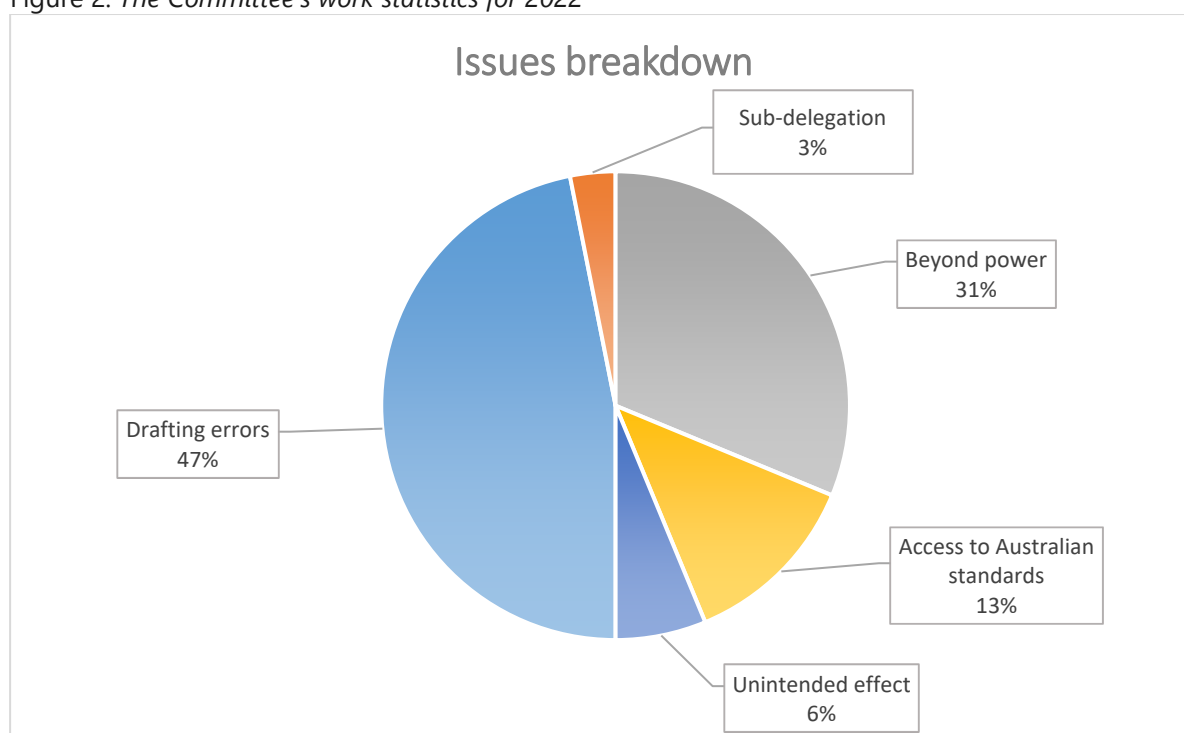
2.2 Table 1 provides a breakdown of the Committee's activities in respect of instruments published in the *Government Gazette* during the Reporting Period.

Table 1. *The Committee's work statistics for 2022*

Disallowable instruments published in the <i>Government Gazette</i>	329
• Regulations	163
• By-laws (made by the Executive)	4
• Local laws (made by local government)	99
• Rules	26
• Other instruments referred (including planning schemes, orders, codes, notices and plans)	37
Notices of motion for disallowance given	13
Motions to disallow discharged	17 <sup>12</sup>
Hearings held by the Committee	0
Instruments for which undertakings were provided to the Committee to amend the instrument	24
Instruments for which undertakings were provided to the Committee to repeal the instrument	3
Reports tabled	1 <sup>13</sup>
Disallowance reports tabled	0

2.3 Figure 2 displays information about the nature, number and frequency of issues the Committee encountered. Some instruments (local laws) contained multiple issues.

Figure 2. *The Committee's work statistics for 2022*



<sup>12</sup> Includes discharges of motions placed in 2021.

<sup>13</sup> Joint Standing Committee on Delegated Legislation, report 2, *Annual Report 2021*, Western Australia, Legislative Council, 16 June 2022.

2.4 The issues identified in Figure 2 are defined as follows:

- Unintended effect: Where an instrument has offended the Committee's TOR 10.6(b), having an unintended effect on any person's existing rights or interests. This includes where an instrument attempts to erode fundamental common law rights such as personal liberty and proprietary rights.
- Access to Australian standards: Where an instrument incorporates Australian standards by reference, which become part of the law, but cannot be accessed free of charge.<sup>14</sup>
- Beyond power: An instrument will be invalid if it is not authorised or contemplated by the empowering Act.
- Sub-delegation: A body delegated the power to make legislation cannot itself delegate power (sub-delegate) unless authorised by the empowering Act. For instance, local government councils have been delegated the power to make local laws under the *Local Government Act 1995* (LGA). This cannot be delegated to local government staff.<sup>15</sup>
- Drafting errors: These can include:
  - typographical or formatting errors
  - cross-referencing to the wrong clauses or schedules
  - clauses with missing text
  - other errors which make the clause difficult to understand.

### Drafting issues

- 2.5 Forty-seven percent of the issues encountered in 2022 related to drafting. This is a reduction from 66 percent in 2021, 70 percent in 2020 and 52 percent in 2019.
- 2.6 The majority of drafting issues were in local laws.
- 2.7 The quality of drafting of some local laws remains a concern. The Committee strongly encourages local governments to undertake vigorous proofreading and cross-reference checks. This will reduce errors and, consequently, the investment of Committee time in correcting them.

### Undertakings

- 2.8 During the Reporting Period, the Committee received departmental (Ministerial) undertakings covering 3 instruments and local government undertakings covering 24 local laws.

### Local Laws Working Group meeting

- 2.9 The Local Laws Working Group (Working Group) is hosted by the DLGSC and comprises representatives from:
- the Office of the Minister for Local Government
  - WALGA
  - the Department of Health

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<sup>14</sup> Joint Standing Committee on Delegated Legislation, report 84, [\*Access to Australian Standards adopted in delegated legislation\*](#), Western Australia, Legislative Council, 23 June 2016.

<sup>15</sup> Joint Standing Committee on Delegated Legislation, report 77, [\*Inquiry into a Proposed Template Waste Local Law\*](#), Western Australia, Legislative Council, 27 November 2014, p 11.

- the Department of Water and Environmental Regulation
  - the Department of Treasury
  - Committee Members and Committee staff.
- 2.10 The Working Group provides an opportunity for participants to discuss local law issues of concern, including issues raised in this report.
- 2.11 The Working Group met on 9 March 2022, having last met on 14 November 2017. As with past meetings, it provided a valuable forum to update participants on new developments and initiatives.
- 2.12 The Committee thanks the representatives of each of the bodies listed above and the DLGSC for hosting the meeting. The Committee particularly thanks Mr Steven Elliott, Senior Legislation Officer, DLGSC, for organising the meeting and looks forward to future meetings.

### 3 Issues in regulations

- 3.1 The Committee found that most regulations scrutinised in the Reporting Period were well drafted and had only minor issues, if any.

#### Energy Regulations Amendment (Electricity Licensing) Regulations 2022

- 3.2 The Energy Regulations Amendment (Electricity Licensing) Regulations 2022 (Amendment Regulations) addressed a number of matters, including the operation of the Energy Licensing Board (Board). These included Board member eligibility and vacancies and its ability to delegate its powers and duties.
- 3.3 Section 32(3)(e) of the *Electricity Act 1945* authorises the Director of Energy Safety (Director) to:
- delegate his or her powers to a Board, and the exercise by the Board of such powers as are so delegated or as are prescribed including the issue of licences, permits and authorisations, and the conduct of proceedings, in the name of the Board, and provide for the control or supervision of all such Boards by the Director.
- 3.4 Regulation 63B of the Amendment Regulations, which enables the Director to delegate certain powers to the Electricity Licensing Board (Board), was authorised by section 32(3)(e) and within power.
- 3.5 However, the Committee found that regulation 63C, which enabled the Board to delegate any of its powers and duties under the regulations,<sup>16</sup> was not authorised by section 32(3)(e) or any other provision in the *Electricity Act 1945*. This included the general regulation-making power in section 32(1). The Committee's reasoning was as follows:
- There is a statutory presumption that if a power is vested in an individual, then, subject to a contrary intention, it must be exercised personally by that individual.<sup>17</sup>
  - The statutory presumption was not overridden by any contrary intention in, or any implication derived by the overall purpose and scheme of, the *Electricity Act 1945*.
  - The 'necessary and convenient' regulation making power in section 32(1) cannot support regulations which widen the purposes of the *Electricity Act 1945* or add new and

<sup>16</sup> Other than its power of delegation or any power the Director of Energy Safety has delegated to it.

<sup>17</sup> This is reflected in the Latin maxim *delegatus non potest delegare* (a delegate may not re-delegate).

different means of carrying them out. It is strictly ancillary and will authorise what is incidental to the execution of specific provisions in the *Electricity Act 1945*.<sup>18</sup>

- The Board's powers affect the livelihood of individuals, such as the granting of licenses. This indicates the Parliament intended for it to exercise these powers personally, without a clear indication to the contrary in the *Electricity Act 1945*.

3.6 The Minister for Commerce undertook to delete regulation 63C.

## Public Trustee Scale of Fees

3.7 The Committee scrutinises fee increases, considering whether fees for services charged by agencies are authorised by the empowering Act. If there is evidence that:

- a fee does not bear a reasonable relationship to the costs of providing the relevant services
- a fee is above 100% cost recovery
- any cross-subsidisation between fee types may result in fees over recovering,

a fee may be regarded as an unauthorised tax in the absence of a taxing power and the Committee may recommend the disallowance of those fees.

3.8 Section 38A of the *Public Trustee Act 1941* requires the Public Trustee to determine a Scale of Fees in accordance with its Annual Agreement with the Minister.

3.9 Section 38B(3) provides:

- (3) Nothing in this section prevents the Public Trustee from being reimbursed for all expenses properly incurred by the Public Trustee in the administration or management of an estate.

3.10 The Public Trustee increased its hourly rate in 2022/23 by the Consumer Price Index, being 2% to \$313 (rounded up to the nearest dollar so effectively a 2.3% increase). This compares to 1.75% to \$306 (rounded up to the nearest dollar so effectively a 2% increase), in 2021/22. The explanatory material for the instrument stated that all fees were either at or under cost recovery and there was no cross-subsidisation.<sup>19</sup>

3.11 On 10 August 2022 the Office of the Auditor-General published its 3rd report: *Public Trustee's Administration of Trusts and Deceased Estate*, which was tabled in Parliament.<sup>20</sup>

3.12 The report concludes that the Public Trustee's administration of trusts and deceased estates is only partly effective. It found some clients were charged considerable fees for little work and that its self-funding fee and governance model warrants review by the Department of Treasury. More specifically, it states:

Currently, the cost of these services is paid through fees charged to other clients, who may not be aware their fees help to meet these costs.<sup>21</sup>

3.13 The report found, relevantly, that:

- Generally, fees charged reasonably reflected the work done.

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<sup>18</sup> *Shanahan v Scott* [1957] 96 C.L.R 245 at p 250.

<sup>19</sup> Public Trustee Scale of Fees, *Explanatory Memorandum*, pp 2-3.

<sup>20</sup> See [Report-3 Public-Trustees-Administration-of-Trusts-and-Deceased-Estates.pdf \(audit.wa.gov.au\)](#).

<sup>21</sup> [Report-3 Public-Trustees-Administration-of-Trusts-and-Deceased-Estates.pdf \(audit.wa.gov.au\)](#).

- In some cases the full scheduled fee had been charged where the actual work done was minimal or automated and that it is possible for clients to incur considerable fees for relatively little work by the Public Trustee on their trusts.

3.14 Key recommendations included that:

- The Public Trustee should actively consider a credible and practical approach to assess whether full scheduled fees reasonably reflect the work on a trust account and should be charged.
- The Department of Treasury should review the appropriateness and transparency of the Public Trustee's fees and self-funding model.

3.15 In addition to requesting an undertaking to correct a typographical error, the Committee requested details on the scope of the Treasury review and to be notified once it is completed. The Treasurer provided details of the review [Hon Mark McGowan MLA, Treasurer, Letter, 11 October 2022]. The Committee was satisfied with this response and will consider the review once published.

## 4 Issues in local laws

### Public disclosure of confidential Committee correspondence

4.1 All Committee correspondence to the Mayor or President of local government councils contains the following confidentiality warning:

This correspondence including any attachments is confidential and privileged. Your local government may only discuss the content of this letter and any attachments with the Western Australian Local Government Association, the Department of Local Government and the Shire's legal advisors to the extent necessary to obtain information the Committee seeks. Each person to whom you distribute this material must be made aware of its confidential and privileged status.

- 4.2 There have been a number of instances where the publically available minutes of council meetings have included passages from Committee correspondence and/or attached them to the meeting agenda.
- 4.3 The unauthorised public disclosure of confidential Committee correspondence is a breach of parliamentary privilege and may amount to a contempt of the Legislative Council. Schedule 4 of the Standing Orders of the Legislative Council sets out the criteria that is taken into account when determining whether a contempt has been committed. One criterion is (emphasis in italics added):

#### 14. Unauthorised Disclosure

A person shall not, without the authority of the Council or a Committee, disclose or publish –

- (a) a document submitted to the Council, where the Council has ordered that document not be made public;
- (b) any private or in camera evidence received by a Committee;
- (c) *any material produced by a Committee*; or
- (d) any deliberation of a Committee.

- 4.4 Committee material is any correspondence, draft report or information produced by a Committee.<sup>22</sup>
- 4.5 Breaches of parliamentary privilege are serious matters which may give rise to significant penalties.<sup>23</sup>
- 4.6 The Committee considers local government councils should close meetings when Committee correspondence is discussed. This is an effective method for ensuring confidentiality is maintained and minimises the risk of breaching parliamentary privilege. Committee correspondence should not be disclosed without the Committee's consent.

## Available infringement of the Committee's terms of reference

- 4.7 During the Reporting Period there were a number of avoidable instances of local laws infringing the Committee's terms of reference.
- 4.8 For example, the Shire of Meekatharra was not liable to compensate an owner or occupier of premises for damages unless resulting from its negligence or breach of duty.<sup>24</sup> The Committee had previously found identical clauses were inconsistent with section 3.22(1) of the LGA and sought and received undertakings for their deletion.<sup>25</sup>
- 4.9 The Committee strongly recommends local governments check the [undertakings list](#) for local laws on its website as well as any relevant disallowance reports before drafting local laws. This will help avoid copying provisions of other local laws subject to Committee undertakings.

## Cat local laws

- 4.10 In its 2021 Annual Report, the Committee reported on the inconsistency of clause 2.2 of the *Town of Bassendean Cats Local Law 2021* with the *Cat Act 2011*. It stated:

### 2.2 Cats in places that are not public

- (1) A cat shall not be in any place that is not a public place unless consent to it being there has been given by the owner or occupier of the premises, or a person who has been authorised to consent on behalf of the owner or occupier.
- (2) If a cat is at any time in a place in contravention of subclause 2.2(1)—
  - (a) the owner of the cat commits an offence; and
  - (b) an authorised person may seize and impound the cat in accordance with the Act.

This clause operated so that a cat owner would have to effectively confine their cat(s) to their property to avoid committing an offence. This is because:

- if not confined, given their range, it is very likely cats will stroll onto other private property.
- it is impracticable to obtain consent from every private property owner in the district or even in close vicinity to the cat owner, making consent illusory.

<sup>22</sup> Standing Order 174 of the Legislative Council Standing Orders.

<sup>23</sup> Joint Standing Committee on Delegated Legislation, report 37, [Unauthorised disclosure of Confidential Committee Correspondence by the City of Joondalup](#), Western Australia, Legislative Council, 26 November 2009.

<sup>24</sup> [Shire of Meekatharra Health Local Law 2021](#), cl 6.24(2), 7.4(4) and 7.11(3).

<sup>25</sup> [Shire of Waroona Health Local Law 2021](#), cl 6.10(3), 7.4(4) and 7.11(3).



The *Cat Act 2011* allows cats to be in public places unless they are not complying with the Act, including those requiring registration or sterilisation.

The Committee found that clause 2.2 was inconsistent with and therefore not authorised by the *Cat Act 2011*. The Committee requested and received from the Town of Bassendean an undertaking to delete clause 2.2.<sup>26</sup>

- 4.11 In the Reporting Period, the cat local laws outlined below were also inconsistent with the *Cat Act 2011* for similar reasons. This was despite the DLGSC warning local governments that the Committee may request an undertaking to delete clauses that:
- ban cats from public areas
  - place conditions on when a cat may be permitted in a public area
  - have the practical effect of limiting cats to their owner's premises.
- 4.12 By contrast, the Committee found that clauses prohibiting cats from specific areas such as reserves, recreation sites, vacant land and cemeteries, as authorised by section 79(3)(f) of the *Cat Act 2011*, were within power.<sup>27</sup>
- 4.13 By checking the Committee's [undertakings list for local laws](#) and following the DLGSCs advice, local governments can save time and cost by reducing the risk of their cat local laws being subject to undertakings.

### ***City of Kwinana Cats Local Law 2022***

- 4.14 One of the purposes of the *City of Kwinana Cats Local Law 2022* was to prevent cats from being in a public place unless under effective control.
- 4.15 Clause 3.1 of the local law stated:

#### **3.1 Cats wandering**

- (1) A cat shall not be in a public place unless the cat is under effective control.
- (2) A cat shall not be in a place that is not a public place without the consent of the owner or occupier.
- (3) If a cat is at any time in contravention of clause 3.1(1) or 3.1(2)—
- (a) the person liable for the control of such cat commits an offence; and
  - (b) an authorised person may seize and impound the cat and deal with the cat pursuant to the Act.

- 4.16 Clause 3.1 operated as an effective ban on cats in all places unless:
- on the owner's private property
  - under effective control in a public place
  - with the consent of the owner of other private property.
- 4.17 The City did not follow the DLGSC's recommendation to delete clause 3.1. The Committee found clause 3.1 was not authorised by the *Cat Act 2011* for similar reasons to the *Town of Bassendean Cats Local Law 2021*. The City undertook to delete clause 3.1.

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<sup>26</sup> Joint Standing Committee on Delegated Legislation, report 2, [Annual Report 2021](#), Western Australia, Legislative Council, 16 June 2022, pp 9-10.

<sup>27</sup> [Shire of Cuballing Cats Local Law 2021](#).

## ***City of Fremantle Cat Management Amendment Local Law 2022***

4.18 Clause 7 of the *City of Fremantle Cat Management Amendment Local Law 2022* changed the description of places where cats are prohibited by amending Schedule 3. It was changed from 12 parks, reserves and golf courses to 'all City of Fremantle owned and managed property'.

4.19 The City explained this approach as follows:

The common approach has been to list all areas in the schedule individually.

This is not considered practicable as the City would need to list approximately 294 properties individually and then amend the local law each time there was a change.

It is not clear if this format will raise objections from the DLGSC or the JSCDL.<sup>28</sup>

4.20 The DLGSC suggested the City delete clause 7 and advised that if it isn't removed:

it is likely the Committee will request an undertaking to delete it. Alternatively, the City might consider limiting the clause to only apply to City facilities or consider adding additional properties to the list in the original local law.<sup>29</sup>

4.21 Again, the Committee found the local law was not authorised by the *Cat Act 2011* and requested clause 7 be deleted.

- Amended Schedule 3 had such a broad description of where cats are prohibited that it had the effect of banning cats in public places.
- Each time a cat wanders outside its owner's property, it is likely it will occupy a property covered by amended Schedule 3, including roads and footpaths.
- Amended Schedule 3 had an unreasonable impact on cat owners by forcing them to confine their cats to avoid them committing an offence.
- Amended Schedule 3 was inconsistent with section 79(3)(f), which contemplates specific places.
- Cat owners cannot determine, from amended Schedule 3, exactly which places their cats are prohibited from.

4.22 The City undertook to delete clause 7.

4.23 In summary, the *Cat Act 2011* does not authorise local laws banning or placing restrictions on cats in public places or forcing owners to confining them to avoid committing an offence. Any local law that does so will be beyond power.

4.24 Section 27(a) of the *Cat Act 2011* is the only provision governing cats on public land. It enables an authorised person to seize any cat in a public place they suspect is offending the Act. That is, they believe the cat to be unsterilised, unregistered, not wearing a registration tag or not microchipped. It also enables an authorised person to seize a cat on any premises on request of the owner or occupier of the premises.<sup>30</sup>

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<sup>28</sup> City of Fremantle, [Minutes – Finance, Policy, Operations and Legislation Committee](#), 9 February 2022, p 34. JSCDL is a common acronym used by local governments for the Committee.

<sup>29</sup> City of Fremantle, [Minutes – Ordinary Meeting of Council](#), 22 June 2022, p 27.

<sup>30</sup> Joint Standing Committee on Delegated Legislation, report 78, [Annual Report 2014](#), Western Australia, Legislative Council, 22 January 2015, pp 10-11.

## Inconsistency with section 2.10 of the Local Government Act 1995

4.25 The *City of Stirling Meeting Procedures Local Law 2021* contained several clauses that were inconsistent with the roles of councillors in section 2.10 of the LGA.

4.26 Section 2.10 states:

### **Role of councillors**

A councillor —

- (a) represents the interests of electors, ratepayers and residents of the district; and
- (b) provides leadership and guidance to the community in the district; and
- (c) facilitates communication between the community and the council; and
- (d) participates in the local government's decision-making processes at council and committee meetings; and
- (e) performs such other functions as are given to a councillor by this Act or any other written law.

4.27 Clause 4.5(6) of the local law required that notices of motion must receive the prior written agreement of either two Ward members or a Ward member and the Presiding Member. Clause 5.5(6) imposed the same requirement as clause 4.5(6) before a councillor could table a petition. Clause 7.13(1) prevented councillors from validly criticising previous Council or committee decisions.

4.28 The Committee found these clauses were inconsistent with the role of local government councillors in section 2.10 and therefore unauthorised on the following basis:

- Clause 4.5(6) is inconsistent with section 2.10(a) as it contemplates that councillors represent the interests of all residents in the local government district, not just their Ward.
- Clause 5.5(6) is inconsistent with section 2.10(c) on the same basis as clause 4.5(6).
- Clause 7.13(1) is inconsistent with section 2.10(d) by preventing councillors from validly criticising previous Council or committee decisions.

4.29 The Committee **received undertakings** from the City not to enforce clauses 4.5(6) and 5.5(6) and only enforce a modified clause 7.13(1) that was consistent with section 2.10(d).

4.30 The City also undertook that, if standardised meeting procedures<sup>31</sup> are not introduced within 12 months, by regulation or otherwise, it will make an amendment local law:

- deleting clauses 4.5(6) and 5.5(6)
- amending clause 7.13(1) to insert the words 'except on a motion that the decision be revoked or changed' after 'committee'.

## *City of Vincent Local Government Property Local Law 2021*

4.31 The empowering provision for local laws is contained in section 3.5(1) of the LGA, which states:

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<sup>31</sup> This is part of the package of reforms contemplated by the Local Government Reform Process.

A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.

- 4.32 It has been recognised that the words “necessary or convenient” import an objective standard of reasonableness.<sup>32</sup>
- 4.33 The Committee identified the following clauses in the *City of Vincent Local Government Property Local Law 2021* as having an unreasonable effect and not within power of section 3.5 of the LGA.

#### **Prohibiting mobile phone use in change rooms**

- 4.34 Clause 5.3(l) stated:

##### **5.3 Responsibilities of users of a community facility**

A person while in the administration centre or a community facility, shall not—

- (l) use a mobile phone, camera or other similar recording device in a change room at a community facility.

- 4.35 The clause was intended to prevent the recording and transmission of an image of another person in a change room. The Committee regarded it as too broadly drafted, unreasonable in its application and not within power of the LGA. This is because it could prohibit anyone using their mobile phone in a change room, for whatever reason (i.e. to make a call, access text messages or view social media).

- 4.36 The City undertook to amend the clause to state:

##### **5.3 Responsibilities of users of a community facility**

A person while in the administration centre or a community facility, shall not—

- (l) use any device or equipment (whether electronic or otherwise) to take images or recordings of any person in a change room without that person's prior expressed consent.

- 4.37 This ensured a more targeted approach to reflect the intent of the clause.

#### **Including thoroughfares in ‘smoke-free areas’**

- 4.38 Clause 5.16(c) and (d) was another example of how a broadly drafted provision can have an unreasonable effect.

- 4.39 Division 6 of the local law provides that the City may make a determination ‘prescribing a local government property or thoroughfare, or any part thereof, as a smoke free area’. Included in the definition of ‘smoke free area’ in clause 5.16(c) and (d) were:

- (c) A thoroughfare adjacent to a business or facility where there is activity that caters for children and/or young people; and
- (d) A thoroughfare adjacent to a business or facility where trading with an outdoor eating area as an extension of food premises or licensed premises.

- 4.40 By including thoroughfares, which include roads,<sup>33</sup> the City was banning:

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<sup>32</sup> Joint Standing Committee on Delegated Legislation, report 46, *City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011*, Western Australia, Legislative Council, 24 November 2011, p 13.

<sup>33</sup> *Local Government Act 1995*, s 1.4.

- drivers from smoking in their cars
  - pedestrians from smoking when passing by outdoor eating areas.
- 4.41 The Committee found this restriction unreasonable and regarded regulation on a State, rather than a local level, as more appropriate. This is because cars are private property; drivers would be unaware of the ban and together with pedestrians would not pose the same health risk to others.
- 4.42 The City undertook to amend subclauses (c) and (d).

#### **‘Undesirable’ persons on local government property**

- 4.43 Clause 13.2(1)(b) enabled authorised persons or managers to refuse entry, suspend admission or direct a person to leave local government property where:
- the person has been deemed undesirable by the local government or the authorised person by reason of his or her past conduct.
- 4.44 The local law did not say what “undesirable” means or how someone would qualify as “undesirable”. The clause could be used to discriminate against a person or particular groups of people. The Committee considered that the clause had an unintended effect on existing rights or interests.
- 4.45 The City undertook to delete the clause.

#### ***Shire of Broome Waste Local Law 2021***

- 4.46 The procedures for making local laws in section 3.12 of the LGA enable key stakeholders such as the DLGSC and the public to comment on local laws before they are made.<sup>34</sup> When local governments fail to substantially comply with section 3.12 when making local laws, they not only risk invalidity, but deny public and departmental scrutiny.
- 4.47 The Shire of Broome undertook to the Committee to amend its waste local law to remove a duplicate clause and penalty. Instead of making an amendment local law following the procedures in section 3.12, the Shire re-gazetted the original local law with the amendments.
- 4.48 The Shire had failed to advertise by local public notice and adopt the amendment local law, as required by section 3.12(2), (3), (4) and (6). The Shire undertook to repeal the invalid local law and make a new local law.
- 4.49 The Committee reminds all local governments they must follow all procedures in section 3.12 when amending local laws to comply with undertakings.



Mr Geoff Baker MLA  
**Chair**

<sup>34</sup> Joint Standing Committee on Delegated Legislation, report 14, [\*City of Kalgoorlie-Boulder Activities on Thoroughfares and trading in Thoroughfares and Public Places Amendment Local Law 2018 and City of Kalgoorlie-Boulder Local Government Property Amendment Local Law 2018\*](#), Western Australia, Legislative Council, 18 October 2018, p 1.

## GLOSSARY

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Term	Definition
<b>Amendment Regulations</b>	<i>Energy Regulations Amendment (Electricity Licensing) Regulations 2022</i>
<b>Committee</b>	Joint Standing Committee on Delegated Legislation
<b>Director</b>	Director of Energy Safety
<b>DLGSC</b>	Department of Local Government, Sport and Cultural Industries
<b>ELB</b>	Electricity Licensing Board
<b>LGA</b>	<i>Local Government Act 1995</i>
<b>Privileges Act</b>	<i>Parliamentary Privileges Act 1891</i>
<b>Reporting Period</b>	1 January 2022 to 31 December 2022
<b>TOR</b>	Terms of reference
<b>WALGA</b>	Western Australian Local Government Association
<b>Working Group</b>	Local Laws Working Group





# Joint Standing Committee on Delegated Legislation

## Date first appointed:

25 May 2021

## Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

### '10. Joint Standing Committee on Delegated Legislation

- 10.1 A Joint Standing Committee on Delegated Legislation is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (a) A report of the Committee is to be presented to each House by a member of each House appointed for the purpose by the Committee.
- (b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 10.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is within power;
- (b) has no unintended effect on any person's existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.
- 10.7 It is also a function of the Committee to inquire into and report on -
- (a) any proposed or existing template, *pro forma* or model local law;
- (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
- (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 10.8 The Standing Orders of the Legislative Council relating to Standing Committees will be followed as far as they can be applied.
- 10.9 In this order-
- "instrument" means -
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
- (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- "subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*."



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Parliament House,  
4 Harvest Terrace, West Perth WA 6005  
Telephone: +61 8 9222 7300  
Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)  
Website: <http://www.parliament.wa.gov.au>