



THIRTY-NINTH PARLIAMENT

REPORT 89
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION
ANNUAL REPORT 2016

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

November 2016

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

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 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*.’

Members during 2016:

Mr Peter Abetz MLA (Chairman)

Hon John Castrilli MLA

Hon Mark Lewis MLC (to 22 September)

Mr Paul Papalia MLA

Hon Peter Katsambanis MLC

Hon Robin Chapple MLC (Deputy Chair)

Ms Simone McGurk MLA

Hon Martin Pritchard MLC

Hon Alyssa Hayden MLC (from 11 October)

Staff during 2016:

Stephen Brockway (Advisory Officer)

Kimberley Ould (Advisory Officer (Legal))

Denise Wong (Advisory Officer (Legal)) (June)

Lauren Mesiti (Committee Clerk)

Sarah Costa (Advisory Officer)

Michael Ryan (Advisory Officer) (from October)

Irina Lobeto-Ortega (Advisory Officer (Legal))

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EXECUTIVE SUMMARY FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
ANNUAL REPORT 2016

EXECUTIVE SUMMARY

- 1 This *Annual Report 2016* outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January and 16 November 2016, discusses some of the more notable instruments considered and comments on significant issues arising from the Committee's scrutiny of delegated legislation.
- 2 The Committee's main task is to scrutinise, on behalf of the Parliament, instruments made under statutory delegation by the Governor in Executive Council, Ministers, statutory bodies and local governments, and to highlight any instruments that, in the Committee's view, are beyond the scope of the delegated power, or are otherwise in breach of the Committee's Terms of Reference (Terms of Reference).
- 3 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider delegated legislation published under section 41(1)(a) of the *Interpretation Act 1984* or another written law.
- 4 A large volume of delegated legislation continues to be scrutinised each year. In the period to 31 October 2016, the Committee was referred 340 gazetted instruments, including 168 regulations and 104 local laws. While the number of disallowable instruments referred to the Committee this year is lower than in previous years, this was due not only by the shorter reporting period (necessitated by the expected prorogation of Parliament ahead of the 2017 election), but also in part to the Parliamentary Counsel's Office recent practice of drafting 'omnibus' instruments.¹ Thus, the 168 sets of regulations gazetted between 1 January and 31 October 2016 actually provided amendments to 257 sets of principal regulations, all of which required scrutiny (see paragraphs 2.2 to 2.5).
- 5 Only two instruments were referred to Parliament for consideration as to whether they should be disallowed under section 42 of the *Interpretation Act 1984*. This however does not reflect the volume of work undertaken by the Committee, as it does not take account of the efforts made, behind the scenes, to reach agreement with Ministers on amendments to regulations, or to obtain undertakings from Ministers, statutory bodies or local governments to repeal, remake or amend delegated legislation.

¹ Instruments which contain amendments to more than one set of regulations, usually empowered by more than one Act.

- 6 Where undertakings are given to the Committee (and advised on the Committee's website for the benefit of drafters of delegated legislation), Motions for disallowance are usually not proceeded with in the Parliament. The Committee only recommends disallowance where agreement cannot be reached on acceptable amendments, or where the identified defect in the instrument cannot be cured without re-making the instrument (for example, because statutory procedures for the making of the instrument were not followed).
- 7 In addition to the scrutiny of instruments, the Committee completed its own motion inquiry into access to Australian Standards in delegated legislation under the power granted under Term of Reference 10.7. The report was tabled on 23 June 2016 and has been well received (see paragraphs 3.2 to 3.10).
- 8 Members of the Committee trust that the matters noted in this report will assist drafters in understanding the Committee's processes and the issues that have been taken with previous instruments, as well as informing the drafting of future delegated legislation.
- 9 The Committee extends its appreciation to those Ministers and contact persons in departments, statutory bodies and local governments who provided assistance to the Committee.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2016

1 INTRODUCTION

Overview

- 1.1 This *Annual Report 2016* outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January and 16 November 2016, discusses some of the more notable instruments scrutinised and comments on significant issues arising from the Committee's scrutiny of delegated legislation.
- 1.2 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider delegated legislation published under section 41(1)(a) of the *Interpretation Act 1984* or another written law.² It considers whether each instrument subject to disallowance by Parliament complies with or offends any of the requirements set out in item 10.6 of its Terms of Reference, including whether the instrument is '*within power*' or '*contains only matter that is appropriate for subsidiary legislation*'.
- 1.3 The current incarnation of the Committee, like previously constituted Joint Standing Committees on Delegated Legislation since 2001, considers only instruments of delegated legislation that are subject to disallowance pursuant to section 42 of the *Interpretation Act 1984* or another written law, and any other instrument noted by an individual Member.
- 1.4 The majority of the instruments considered are regulations made by the Executive Government via the Governor in Executive Council. Other instruments include local laws made by 139 local governments as well as other instruments and orders made by the Governor or Ministers on the advice of statutory bodies and boards.

Committee Members

- 1.5 In 2016, the Committee was constituted by the Members noted on the inside cover of this report. Hon Mark Lewis MLC served as a Committee Member until 22 September 2016, when he was appointed Minister for Agriculture and Food. Hon Alyssa Hayden MLC was appointed on 11 October 2016 as his replacement.

² Term of Reference 10.5.

Figure 1: Committee Members as at 19 October 2016



Left to right: Hon Martin Pritchard MLC, Mr Paul Papalia MLA, Mr Peter Abetz MLA (Chairman), Hon Robin Chapple MLC (Deputy Chair), Hon John Castrilli MLA. Missing from photograph: Ms Simone McGurk MLA, Hon Peter Katsambanis MLC, Hon Alyssa Hayden MLC.

Terms of Reference

- 1.6 The Committee's Terms of Reference are listed on the inside cover of this Report. They were amended following a review of the Legislative Council Standing Orders in 2012-13 and took effect when adopted by the Parliament on 23 May 2013.

2 COMMITTEE ACTIVITIES

Volume of work to 31 October 2016

- 2.1 The Committee held 16 meetings in the period to 31 October 2016, and the following table provides a breakdown of the Committee's activities in respect of instruments gazetted during that period. Further meetings were held on 9 and 16 November 2016.

Disallowable instruments gazetted	340
<i>Regulations gazetted</i>	<i>168</i>
<i>By-laws (all by-laws were made by the Executive)</i>	<i>16</i>
<i>Local laws made by local government</i>	<i>104</i>
<i>Rules referred</i>	<i>12</i>
<i>Other instruments referred (including planning schemes, orders, notices and plans)</i>	<i>40</i>
Notices of motion for disallowance given	11
Motions to disallow discharged	7
Hearings held by the Committee	1

Instruments where undertakings were provided to the Committee to amend the instrument	6
Reports tabled in 2016	6
Disallowance reports tabled in 2016 ³	2
Instruments disallowed on recommendation of the Committee ⁴	2

Omnibus instruments

- 2.2 While the number of disallowable instruments referred to the Committee this year is lower than in previous years, this was due, in part, to the Parliamentary Counsel's Office recent practice of drafting 'omnibus' instruments; they are instruments which contain provisions affecting more than one set of principal regulations that used to appear in individual amending instruments, and which are empowered by more than one Act.
- 2.3 For example, the *Commerce Regulations Amendment (Fees and Charges) Regulations 2016* made amendments to some 18 sets of regulations that were made under 18 different statutory heads of power. The *Attorney General Regulations Amendment (Fees) Regulations 2016* amended nine sets of regulations made under nine different heads of power contained in nine different statutes, and the *Transport Regulations Amendment (Fees and Charges) Regulations 2016* amended eight principal sets of regulations under the authority of seven Acts.
- 2.4 Whilst this practice was introduced in order to ease the administrative burden on the Executive, and it clearly produces welcome efficiency gains, it does not lessen the volume of work undertaken by the Committee. Thus, the 168 sets of regulations gazetted actually provided amendments to 257 sets of principal regulations.
- 2.5 To date, the omnibus instruments have amalgamated amendments which are authorised under Acts which fall under the one government portfolio, as part of the understanding between the Committee and Parliamentary Counsel's Office.

Committee process

- 2.6 When the Committee has questions about an instrument, it usually writes to or contacts the relevant Minister or local government President or Mayor and requests further information to assist in its examination of it. In many instances, responses received address the Committee's questions and no further action is taken.

³ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 85, *Albany Cemetery Board By-Laws Amendment*, 18 August 2016, and Report 86, *Shire of Kellerberrin Dogs Local Law 2015*, 18 August 2016.

⁴ *Albany Cemetery Board By-Laws Amendment* and *Shire of Kellerberrin Dogs Local Law 2015*.

- 2.7 When the Committee identifies an issue of concern and forms the view that a clause or clauses in the instrument offend the Committee's Terms of Reference, it usually seeks an undertaking from the responsible Minister or local government to amend the instrument.
- 2.8 While the Committee awaits the response to investigations or its request for undertakings on a particular instrument, it is often necessary to authorise a Committee Member to table a Notice of Motion in the Legislative Council to recommend disallowance of the instrument. This is because section 42 of the *Interpretation Act 1984* provides that such a Notice must be moved within 14 sitting days of the instrument being tabled in the Parliament.⁵ The vast majority of these Notices of Motion (which, two sitting days after being moved, become Motions to disallow) are later discharged from the Notice Paper following receipt of satisfactory responses from Ministers and local governments.
- 2.9 When requested undertakings are provided, the usual course is for the Committee to accept the undertaking and recommend the discharge of the Motion to disallow. The statistics relating to this practice are contained in the table at paragraph 2.1. When required, however, the Committee reports to the Parliament recommending the disallowance of all or part of the instrument.
- 2.10 Most issues raised by the Committee arise because the Committee forms the view that the instrument (or a part of it) offends the Committee's Term of Reference 10.6(a) and is therefore invalid. This Term of Reference provides that the Committee is to inquire into whether an instrument '*is within power*' of the empowering enactment.

Undertakings to amend delegated legislation

- 2.11 The Committee posts two lists of undertakings on its website, namely:
- departmental undertakings (undertakings provided by government departments, agencies and statutory authorities)
 - local government undertakings.
- 2.12 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 is a point of reference for local governments and their advisers to ascertain systemic problems with a particular type of local law and issues with which the Committee has taken issue.

⁵ Note that other Acts may provide for a different period during which Notices of Motion to disallow their delegated legislation may be given.

- 2.13 At the Committee's request, the responsible Minister, department or local government usually undertakes to amend or repeal the delegated legislation within six months of the date of the undertaking. During the reporting period, one departmental and five local government undertakings were provided.
- 2.14 The Committee monitors whether delegated legislation has been amended within the agreed timeframe.

Australia-New Zealand Scrutiny of Legislation Conference 2016

- 2.15 This conference was hosted by the Western Australian Parliament on 11-14 July 2016, and attended by delegates from the Commonwealth, State and Territory Parliaments as well as from as far afield as New Zealand, Fiji, Kiribati and Nepal. The Committee made a significant contribution to the success of the conference. As mentioned at paragraph 3.7, Mr Peter Abetz MLA, Chairman, presented a paper on the inquiry which resulted in Report 84—*Access to Australian Standards adopted in delegated legislation*, and participated as a panel member during a facilitated panel discussion on the topic of '*Scrutiny of delegated legislation: The appropriate delegation of legislative power, the rise of subdelegation and other challenges*'. Hon John Castrilli MLA chaired a session on '*Scrutiny in the Pacific*', and a number of other Members and staff attended and contributed, in particular Ms Simone McGurk MLA and Hon Martin Pritchard MLC.

Figure 2: Some of the delegates at the Australia-New Zealand Scrutiny of Legislation Conference, Perth, 11-14 July 2016



Parliamentary delegations from the Gauteng Provincial Legislature and the Legislative Assembly of Saskatchewan

- 2.16 In April 2016, the Committee was delighted to play a part in hosting a visit from Members and staff of its counterpart in the Gauteng Provincial Legislature (South Africa), the Standing Committee on the Scrutiny of Subordinate Legislation. As well as meetings and a formal lunch with the Committee, the delegates enjoyed a visit to the City of Wanneroo to hear from Councillors and staff (as well as the Western Australian Local Government Association (WALGA)) about local government initiatives. They also heard presentations from the Departments of Finance and Transport regarding the scrutiny of legislation from a departmental point of view.

Figure 3: Members of the Gauteng Provincial Legislature with Members of the Committee



Left to right: Hon John Castrilli MLA, Hon Robin Chapple MLC (Deputy Chair), Hon Jacqueline Mofokeng (Chair, Standing Committee on the Scrutiny of Subordinate Legislation), Mr Peter Abetz MLA (Chairman), Hon Maggie Tlou, Hon Hoffinel Ntobeng, Hon Mike Madlala (Standing Committee on the Scrutiny of Subordinate Legislation)

- 2.17 In September 2016, Committee Members hosted a most informative morning tea with visiting Members and staff of the Legislative Assembly of Saskatchewan (Canada) as part of a wider programme of events arranged for them during their educational program in Western Australia.

3 COMMITTEE REPORTS

3.1 In 2016, the Committee presented the following six reports⁶ to the Legislative Assembly and Legislative Council (as well as this report):

- Report 83—*Annual Report 2015*, tabled on 18 February 2016.
- Report 84—*Access to Australian Standards adopted in delegated legislation*, tabled on 23 June 2016 (paragraphs 3.2 to 3.7).
- Report 85—*Albany Cemetery Board By-laws Amendment*, tabled 18 August 2016.
- Report 86—*Shire of Kellerberrin Dogs Local Law 2015*, tabled on 18 August 2016.
- Report 87—*Observations arising from the Committee review of the City of Joondalup Local Government and Public Property Amendment Local Law 2015*, tabled on 8 September 2016 (see paragraphs 5.11 to 5.17).
- Report 88—*Review of the government response to Report 84—access to Australian Standards adopted in delegated legislation*, tabled on 8 September 2016.

Reporting to Parliament on any systemic issue identified in two or more instruments of subsidiary legislation

3.2 As advised in the Committee's Reports 74⁷ and 83⁸, the Committee initiated an inquiry into access to Australian Standards that are incorporated into delegated legislation in 2014. The Committee tabled its final report on this matter on 23 June 2016.⁹

3.3 In brief, the inquiry was into issues that may arise when Australian Standards are incorporated by reference into delegated legislation. Standards are not recited in full, merely referenced. This has advantages, in that many Standards are long and technical and their provisions would not read well in legislation. Adoption of Standards also promotes unity across jurisdictions, including international ones.

⁶ Committee reports can be viewed at www.parliament.wa.gov.au/del, by choosing 'REPORTS'.

⁷ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 74, *Inquiry into access to Australian Standards adopted in delegated legislation—Terms of Reference*, 11 September 2014.

⁸ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 83, *Annual Report 2015*, 18 February 2016.

⁹ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 84, *Access to Australian Standards adopted in delegated legislation*, 23 June 2016.

- 3.4 However, due to a contractual arrangement between Standards Australia (the author) and SAI Global (the publisher and distributor), the contents of the Standards cannot be accessed by those affected by them free of charge. Nor is this Committee able to fully scrutinise some aspects of delegated legislation without cost. The Committee received written and oral evidence from all manner of witnesses, representing businesses and trades, government departments, libraries and unions, as well as governments of other Australian jurisdictions.
- 3.5 The problem of access in all of those jurisdictions was exacerbated when, during the course of the inquiry, the National and State Libraries ceased subscribing to the online service provided by SAI Global because of restrictions on access, and on the use of those Standards after access had been gained, that were imposed by the applicable licence terms.
- 3.6 The Committee made some interim recommendations to allow for more ease of access, both for persons affected and for Parliament, but recognised that a national solution was required. Thus, the main recommendation of the Committee, recommendation 12, states:

*The Committee recommends that the Minister for Commerce works with his colleagues on the Industry and Skills Council of the Council of Australian Governments with a view to agreeing to a fully publicly-funded model for online access to the full suite of information in which copyright is currently held by Standards Australia, upon the cessation of the Publishing Licensing Agreement between Standards Australia and SAI Global Ltd., with an implementation target of either 2018 or 2023 depending on the terms of that agreement.*¹⁰

- 3.7 The Chairman presented a paper on the inquiry at the Australia-New Zealand Scrutiny of Legislation Conference 2016. The Committee's report has been well received, both generally and by the Government. Of the 12 recommendations made by the Committee, the Government supported all but one, at least in part or in principle. In response to Recommendation 2 of the report, which read:

*The Committee recommends that the Minister for Commerce, as a member of the Industry and Skills Council of the Council of Australian Governments, seeks to have placed on the agenda of that Council a discussion with Commonwealth, State and Territory colleagues regarding the options open to Standards Australia (if any) when the option clause in the Publishing Licensing Agreement is considered in 2018.*¹¹

¹⁰ *ibid*, p 143.

¹¹ *ibid*, p 40.

the Government has advised that the Minister for Commerce ‘*has commenced action to have the matter listed for consideration at the next meeting*’¹² of the Industry and Skills Council.

- 3.8 The subject matter of this inquiry is an issue that has long been debated around the country, but this is the first time that a parliamentary committee has properly inquired into it or reported on it. It outlines serious concerns about the ability of members of the public, businesses, government, unions and indeed members of parliaments to access Standards free of charge. Where they have been adopted in regulations and local laws, Standards become as much a part of the law as the contents of any statute. The Committee is strongly of the view that, as such, those laws should be freely available to all.
- 3.9 This is not a problem that afflicts just Western Australia, and the Committee was aware that other Governments across the country were awaiting the outcome of this inquiry. As mentioned above, a workable solution cannot be achieved by this Parliament or by the Government of Western Australia working alone. The Committee is hopeful that the Commonwealth, States and Territories will all add support, and that this is followed by nationwide action.
- 3.10 The Committee’s thanks go out to all of those who provided evidence to the inquiry.

4 ISSUES RELATING TO REGULATIONS AND BY-LAWS

Appeal mechanisms in hospital By-laws

- 4.1 In January 2015, the Committee reviewed the *Fiona Stanley Hospital By-laws 2014*. In relation to provisions regarding applications for onsite parking permits under these by-laws, the Committee noted that there was no mechanism for seeking a review of a decision to refuse such a permit—this, it was felt, offended the Committee’s Term of Reference 10.6(c), which states:

In its consideration of an instrument, the Committee is to inquire whether the instrument –

- (c) provides an effective mechanism for the review of administrative decisions.*

- 4.2 In response to a request from the Committee, the Minister for Health undertook to resolve the matter when the next opportunity arose.

¹² Government of Western Australia, *State Government response to Joint Standing Committee on Delegated Legislation Report 84, Access to Australian Standards adopted in delegated legislation*, 25 August 2016, p 1.

- 4.3 Later that year, requisite amendments were made to the By-law, creating an appeal and review mechanism. However, when the Committee was called upon to review amendments to the By-laws relating to the Fremantle Hospital, the Royal Perth Hospital, the Women's and Children's Hospital and the Queen Elizabeth II Medical Centre, no similar provisions had been included.
- 4.4 The Minister resolved to remedy this in September 2015. However, in all but one of the cases, the issue was overtaken by events. The *Health Services Act 2016* (which came into force on 1 July 2016) repealed the By-laws relating to all of those hospitals except for the Queen Elizabeth II Medical Centre. In their place, the *Health Services (Conduct and Traffic) Regulations 2016* were made, including (at regulation 24) provisions for seeking a review of parking permit decisions. The By-law for the Queen Elizabeth II Medical Centre was amended to include similar provisions at the same time.

Appeal mechanisms in technical and further education (TAFE) By-laws

- 4.5 More recently, a similar issue arose with regard to By-laws made under the *Vocational Education and Training Act 1996* in respect of five TAFE colleges, following a reorganisation of TAFE provision in the State. These were the *North Metropolitan TAFE By-laws 2016*, the *South Metropolitan TAFE By-laws 2016*, the *South Regional TAFE By-laws 2016*, the *Central Regional TAFE By-laws 2016* and the *North Regional TAFE By-laws 2016*. The instruments dealt with matters such as the conduct of students, and at by-law 19 of each instrument, set out possible disciplinary consequences as follows:
- (a) *a fine not exceeding \$50;*
 - (b) *suspend all or any of the privileges of the enrolled student;*
 - (c) *exclude the enrolled student from attending college lectures, tutorials, workshops or other training activities;*
 - (d) *withhold assessment results of the enrolled student;*
 - (e) *suspend the enrolled student for a period not exceeding 2 semesters of any college course or courses;*
 - (f) *expel the enrolled student from the college;*
 - (g) *refuse the student re-enrolment as a student.*
- 4.6 However, the only remedy available to a student subjected to such a punishment was by way of judicial review, a potentially costly and time-consuming exercise. The Committee took the view that the lack of an internal appeal or review mechanism (as

can be found in equivalent university governing instruments) again fell foul of Term of Reference 10.6(c), and wrote to the Minister of Education accordingly.

- 4.7 By a letter to the Committee in June 2016, the Minister undertook to amend the by-laws to include an internal appeals process for any student penalised under the said by-law 19 by the beginning of the 2017 educational year. In October 2016, the Minister was kind enough to provide the Committee with draft amendments that had been agreed to by the TAFE Governing Councils.

Mental Health Regulations 2015

- 4.8 These regulations came before the Committee in February 2016, following the commencement of the substantive *Mental Health Act 2014*. One provision in particular was of concern to Members. That was regulation 4, which states:

Standards for diagnosing mental illness (Act s. 6(4))

For section 6(4) of the Act, a decision whether or not a person has a mental illness must be made in accordance with the diagnostic standards set out in either or both of these publications —

- (a) the International Statistical Classification of Diseases and Related Health Problems published from time to time by the World Health Organisation;*
- (b) the Diagnostic and Statistical Manual of Mental Disorders published from time to time by the American Psychiatric Association.*

- 4.9 The Committee was aware of some negative comment from the psychiatry profession concerning the second of those publications, known widely as ‘DSM-V’, and was concerned that a reliance on that diagnostic tool might lead to misdiagnosis, with all of the harmful consequences that might follow. It was therefore possible that the regulation ‘*may have an unintended effect on a person’s rights or interests*’ (Term of Reference 10.6(b)).
- 4.10 In May 2016, the Committee took oral evidence from the Chief Psychiatrist of Western Australia, Dr Nathan Gibson. As a result of the reassurances that he was able to provide regarding Members’ concerns about these regulations, the Committee resolved to seek the discharge of the Motion to disallow the instrument, which had been moved in the Legislative Council on 25 February 2016.

Motor Vehicle (Catastrophic Injuries) Regulations 2016

- 4.11 The *Motor Vehicle (Catastrophic Injuries) Regulations 2016*, made under the *Motor Vehicle (Catastrophic Injuries) Act 2016*, prescribe various matters relating to the operation of the Catastrophic Injuries Support Scheme (CISS), including:
- the criteria for catastrophic injury
 - procedures for making applications to participate in the CISS
 - suspension of participation
 - assessment of participants' treatment, care and support needs
 - dispute resolution in relation to various types of decisions under the CISS.
- 4.12 The Committee noted that there were a number of matters which, according to the '*Drafting instructions for subsidiary legislation*', tabled in the Legislative Assembly on 22 March 2016 in relation to the Motor Vehicle (Catastrophic Injuries) Bill 2016,¹³ were to be included in the regulations, and which are now proposed to be included in Guidelines to be issued under the *Motor Vehicle (Catastrophic Injuries) Act 2016*. These Guidelines are expected to be published by the end of 2016. They will not be subject to any parliamentary oversight, as they are not disallowable.
- 4.13 The Committee raised these matters with the Insurance Commission of Western Australia and, subsequently, with the Treasurer, together with concerns that some of the dispute resolution provisions of the regulations did not provide effective mechanisms for review for the purposes of the Committee's Term of Reference 10.6(c).¹⁴
- 4.14 The Committee's concerns were, overall, satisfactorily addressed through correspondence with the Treasurer. However, the Committee expressed some residual concern in relation to the absence of a review mechanism in relation to '*necessary and reasonable expenses*' payable by the Insurance Commission of WA under the *Motor Vehicle (Catastrophic Injuries) Act 2016*, together with some other minor matters. The Treasurer's response is attached at **Appendix 1**.

Health Services (Conduct and Traffic) Regulations 2016

- 4.15 These substantive regulations came before the Committee in August 2016. The Committee's attention was immediately drawn to the penalty provisions for each of the offences created by the regulations—a penalty of \$1,000 (with a modified penalty

¹³ Tabled Paper 3988, Legislative Assembly, 22 March 2016.

¹⁴ '*In its consideration of an instrument, the Committee is to inquire whether the instrument provides an effective mechanism for the review of administrative decisions*'.

of \$200 if dealt with by infringement notice), which contrasted with a penalty of \$50 which had been the maximum possible under by-laws made under the previous legislation (see paragraphs 4.1 to 4.4). The Committee was also aware of some negative publicity with regard to these penalties as they applied to hospital car-parking offences.

- 4.16 In respect of parking offences in hospital car parks, the Committee was of the view that the penalties were manifestly excessive, and a Notice of Motion to disallow the instrument was moved in the Legislative Council. Members took some reassurance, however, from newspaper reports that the Minister for Health had undertaken to review those penalty provisions.
- 4.17 In response to a subsequent letter from the Committee, the Minister for Health confirmed that he too regarded the penalties specified under the regulations to be excessive. He undertook to amend the regulations, and, in the meantime, he confirmed that all fines issued since the commencement of the regulations on 1 July 2016 had been waived, and that any fines paid since that date had been reimbursed.
- 4.18 The Committee was pleased to move to discharge the Motion to disallow the regulations on the basis of the Minister's assurances.

5 ISSUES RELATING TO LOCAL LAWS

Local Government Legislation Amendment Act 2016

- 5.1 This Act was granted Royal Assent on 21 September 2016, and came into force on 12 November 2016. It is likely to have an effect on the Committee's consideration of local laws.
- 5.2 Section 3.12 of the *Local Government Act 1995* requires local laws to be made in accordance with a specified set of sequential procedures, including supplying copies of draft local laws to the Minister for Local Government, consulting on them for a minimum of 42 days, publishing in a State-wide newspaper, etc. The Legislative Council has disallowed a significant number of local laws for not having strictly complied with those procedures.
- 5.3 In its Report 48, the Committee expressed some sympathy with local governments that had failed to follow the correct section 3.12 procedures to the letter, and made a recommendation to Government:

The Committee recommends that the Minister for Local Government amend the Local Government Act 1995 to provide for flexibility in

*section 3.12 in circumstances where there is no adverse impact on the integrity of the local law.*¹⁵

- 5.4 In its Annual Reports for 2011, 2012 and 2013, the Committee reinforced that view, but the Annual Report for 2014 mentioned that the Minister was now proposing an amendment to section 3.12, whereby a local law would not necessarily be invalid if ‘substantial compliance’ with the procedure had been achieved.¹⁶

- 5.5 Section 5 of the *Local Government Legislation Amendment Act 2016* reads:

Section 3.12 amended

After section 3.12(1) insert:

(2A) *Despite subsection (1), a failure to follow the procedure described in this section does not invalidate a local law if there has been substantial compliance with the procedure.*

- 5.6 As a result of the amendment, there should be fewer disallowances of local laws.
- 5.7 It must be conceded at this point that, as a result of the diligent work put in by officers of the Department of Local Government and Communities and WALGA, fewer non-compliant local laws are reaching gazettal and thus Committee consideration. It is evident from reading Council minutes that accompany submissions that the department is not backward in identifying errors and, where necessary, forcing local governments to re-draft and re-advertise their local laws.
- 5.8 Considering recent cases, it must also be conceded that, even if the above provision had been in force, the disallowance of the *Albany Cemetery Board By-Laws Amendment* would still have gone ahead because none of the procedures laid down by section 3.12 for the preparation of the instrument had been followed. In the case of the *Shire of Kellerberrin Dogs Local Law 2015*, the oversight was not supplying the Minister for Local Government with copies of the proposed local law and its statewide public notices. In the cases of the four Kellerberrin laws disallowed in 2015, there was also a failure to supply copies to the Minister, followed by a failure to give public notice of the fact that the four laws had been made and gazetted. A failure to give public notice of the making and gazetting of the law was also the cause of the disallowance of the *City of Fremantle Alfresco Dining Local Law 2014*.

¹⁵ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 48, *Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012, p 4, Recommendation 1.

¹⁶ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 78, *Annual Report 2014*, 22 January 2015, p 9 and pp 8-9 generally.

- 5.9 Clearly, each case in the future will need to be determined on its own facts as to whether ‘substantial compliance’ with the procedures was achieved.
- 5.10 This amendment to the *Local Government Act 1995* is welcomed, will undoubtedly prove to be of use to the Committee, and is testament to the efforts of past and present Members and staff of the Committee who kept the issue alive.

City of Joondalup Local Government and Public Property Amendment Local Law 2015

- 5.11 This was an unusual case where, though the Committee found that there was no cause to recommend disallowance of the instrument, it raised matters of significant concern that warranted the commissioning of a report for tabling in both Houses of the Parliament under the Committee’s overall scrutiny of delegated legislation role.
- 5.12 The issue was and is the use of determination devices by local governments. A determination device is a means by which the council of a local government purports in a local law to sub-delegate the exercise of its powers under the *Local Government Act 1995* to a mere resolution of a simple majority of the council members, or to the administrative arm of the local government.
- 5.13 It is a fundamental principle of administrative law that, where a parliament delegates a power or function to a person or body, that person or body must exercise the power or function personally, and must not delegate it to another: ‘*delegatus non potest delegare*’. Generally, the exercise of the power or function by another will be invalid. Local laws are, of course, made under powers delegated to local governments by Parliament under the terms of the *Local Government Act 1995*.
- 5.14 The issue that arose with the *City of Joondalup Local Government and Public Property Amendment Local Law 2015* was that, whilst the amendment made by the City of Joondalup was in and of itself unobjectionable, the exercise of the power under the delegation was arguably not. The City used its determination-making powers to impose a blanket ban on an activity—the placing and maintenance of charity collection bins—without consideration of individual circumstances. This was a policy that may have been challengeable in the courts on public law grounds by anyone with standing, such as a local charity, for being potentially unreasonable or disproportionate, or an unlawful fetter on discretion. However, the making of the determination which brought the policy into effect by the City is outside of the scrutiny powers of this Committee.
- 5.15 The Committee’s consideration of the issues was recorded in its Report 87—*Observations arising from the Committee review of the City of Joondalup Local*

Government and Public Property Amendment Local Law 2015,¹⁷ tabled on 8 September 2016. The Committee took the view that the use of delegated powers to issue a blanket-ban on a lawful activity, without consideration of individual circumstances by way of a proper application process, and without providing an administrative means to challenge such a ban in individual cases, might be unreasonable, but that this was properly a matter for the courts. The Committee found that, whilst it has a duty to ensure that any sub-delegation contained in delegated legislation is lawful, reasonable and appropriate, it has no authority over the actual exercise of that sub-delegated power.¹⁸

5.16 The following recommendation was made:

*The Committee recommends that the Minister for Local Government and Communities investigated legislative or administrative measures whereby local governments that exercise powers to make determinations that may impact on the existing rights of groups or individuals must act reasonably in all circumstances and ensure that a means exists whereby such determinations may be reviewed.*¹⁹

5.17 A government response to this recommendation is awaited.

Shire of Irwin Meeting Procedures Local Law 2016

5.18 Section 3.8 of the *Local Government Act 1995* states:

3.8. Local laws may adopt codes etc.

- (1) A local law made under this Act may adopt the text of —
- (a) any model local law, or amendment to it, published under section 3.9; or
 - (b) a local law of any other local government; or
 - (c) any code, rules, specifications, or standard issued by Standards Australia or by such other body as is specified in the local law.
- (2) The text may be adopted —

¹⁷ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 87, *Observations Arising from the Committee Review of the City of Joondalup Local Government and Public Property Amendment Local Law 2015*, 8 September 2016.

¹⁸ *ibid*, p 28.

¹⁹ *ibid*, p 31.

- (a) *wholly or in part; or*
 - (b) *as modified by the local law; or*
 - (c) *as it exists at a particular date or, except if the text of a model local law is being adopted, as amended from time to time.*
- (3) *The adoption may be direct, by reference made in the local law, or indirect, by reference made in any text that is itself directly or indirectly adopted.*

5.19 During the year, the Shire of Irwin made the *Shire of Irwin Meeting Procedures Local Law 2016* by adopting the *City of Greater Geraldton Meeting Procedures Local Law 2011*, and then adding its own amendments to that instrument to fit its own circumstances. This was done, it was said, to save *Government Gazette* publication fees.

5.20 Whilst making a local law in this way is perfectly lawful, it is not encouraged by the Committee. It does not reflect best practice because, amongst other things:

- the law is very difficult to read and understand. Any ratepayer wanting to read the law needs to access the Greater Geraldton Law, then understand the cross-referenced amendments. This is not a simple task.
- this method of drafting makes the second law entirely dependent on the first, copied law, not itself being amended. If that first law is amended, the cross-references in the second will not necessarily follow or make sense. The second local government has no control over its own law being amended in this way.

5.21 To illustrate this latter point, the *City of Greater Geraldton Meeting Procedures Amendment Local Law 2016* was gazetted on 11 October 2016, making amendments to the 2011 Law on which the Shire of Irwin is entirely dependent for its own provisions.

5.22 The Committee has now received correspondence from the Department of Local Government and Communities, WALGA and the Shire concerned, all of which have accepted the Committee's view. In the meantime, it is generally accepted that local governments adopting this drafting practice should at least post on their websites fully-consolidated versions of their local laws for ease of community reference, as the Shire has now done.

Shire of Wagin Extractive Industries Local Law 2015

- 5.23 The *Shire of Wagin Extractive Industries Local Law 2016*, gazetted on 12 July 2016, in and of itself, was entirely uncontroversial and lawful. However, the documentation supplied in support of the making of the law made reference to a previous 2001 Extractive Industries Local Law, of which no trace could be found. There appears to be no record of such a law ever having been gazetted or tabled in Parliament.
- 5.24 This did not affect the validity of the 2016 law—it was not an amending instrument. However, Committee Members were concerned that the Shire may have previously charged licence fees for extractions in the local government area, or may have taken action against someone for an infringement of the ‘2001 law’ without having any powers to do so.
- 5.25 The present Councillors and staff of the Shire were, perhaps understandably, unable to confirm whether or not this had occurred. The Committee referred the matter to the Minister for Local Government for further investigation.

Health local laws update

- 5.26 The Committee’s Annual Reports of 2014 and 2015 discussed the Public Health Bill 2014. Among other things, the bill and an accompanying consequential amendments bill would implement the Government’s proposal to remove the health local law-making power from the *Health Act 1911*, relying instead on the heads of power provided by the *Local Government Act 1995* to authorise the making of health local laws. Whilst agreeing with the proposal, the Committee has previously indicated that it would prefer to see the Department of Health maintain a formal role in the vetting of health local laws, stating:

*The Committee is of the view that sections 3.1 and 3.5 of the Local Government Act 1995 would authorise the making health local laws. However, the public health imperative mandates a degree of Department of Health oversight in the making of health local laws, for example, requiring consent of the Executive Director of Public Health as is currently the practice.*²⁰

- 5.27 The Acts resulting from the bills, the *Public Health Act 2016* and the *Public Health (Consequential Provisions) Act 2016*, each received Royal Assent on 25 July 2016, but have not fully commenced operation. In anticipation of the passing of these Acts, the Committee wrote to the Minister in February 2016 to remind him of the Committee’s preference as expressed in the 2014 and 2015 Annual Reports. He

²⁰ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 78, *Annual Report 2014*, 22 January 2015, p 17. The same comments were made in the Committee’s Report 83, *Annual Report 2015*, 18 February 2016, p 25.

replied in March 2016, acknowledging the Committee's interest, and expressing his view that Department of Health's future involvement in the making of local laws might best be achieved by the development of administrative protocols (as well as model local laws for adoption by local governments) between the interested parties.

5.28 Since that time, at the behest of Members, Committee staff have met with representatives of the Departments of Health and Local Government, together with WALGA, in order to progress matters. It would appear from those discussions that the aim of the Department of Health is to review all pieces of delegated legislation made under the old provisions and reduce them from approximately 47 sets of regulations currently in force to around five. At the same time, the department will review documents and instruments such as health local laws, guidance notes, practice notes and the like and seek to incorporate those within the new regulations or other more appropriate instruments. This process will, understandably, take some time to complete.

5.29 It is possible that there will be no future need for health local laws, once the new arrangements have been put in place. However, it is possible that it will be necessary for some residual items to be dealt with in such laws. If that is the case, the two departments and WALGA have agreed that a model law will be produced between them. For ease of administration, the possible route might be:

- to ask the Governor to make a general local law using powers under section 3.17 of the *Local Government Act 1995* to repeal all extant local laws from a given date
- to then develop a model to be considered by the Committee under the power in Term of Reference 10.7(a), in the same way that the Committee considered and reported on the template waste local law.²¹

Cat local laws

5.30 During the year, the Committee obtained undertakings in relation to two cat local laws, the *Shire of Chittering Cats Local Law 2015* and the *Shire of Donnybrook-Balingup Cat Local Law 2016*. The undertakings related, respectively, to provisions in those local laws requiring:

- a permit to keep any cats in areas specified as 'fauna protection buffer zones',²²
- the confinement of cats to the premises at which they are kept.²³

²¹ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 77, *Inquiry into a proposed template waste local law*, 27 November 2014.

²² *Shire of Chittering Cats Local Law 2015*, part 4.

- 5.31 This followed the Governor's local law made in the previous year,²⁴ repealing provisions in five local laws which purported to prohibit all cats from public places unless under the effective control of a person.²⁵
- 5.32 In each of these cases, the Committee considered that the relevant provisions of the local law were inconsistent with or repugnant to the provisions of the *Cat Act 2011* which:
- allow for cats to be in public places unless they do not comply with the provisions of the Act requiring registration, microchipping and sterilisation
 - empower the making of local laws prohibiting cats in certain specified areas.
- 5.33 As in the *Shire of Donnybrook-Balingup Cat Local Law 2016* referred to in paragraph 5.30, in 2016, the Committee has continued to note attempts by local governments to pass local laws effectively prohibiting cats from public and other, unspecified, places.

6 FEES AND CHARGES

- 6.1 The Committee is pleased to report that departments' compliance with the *Premier's Circular 2014/1—Subsidiary Legislation—Explanatory Memoranda* has been commendable this year. The vast majority of the fee tables submitted met the requirements of the circular, for example, indicating cost-recovery statistics. There were also very few cases of fee increases exceeding the Consumer Price Index—where the fee increases were higher than the index, they could be justified on the basis of achieving, or striving to achieve, full cost recovery.

7 CONCLUSION

- 7.1 The Committee relies on the assistance provided by relevant Ministers, departments, statutory bodies and local governments in undertaking its function of scrutinising a large volume of delegated legislation within defined time constraints. The Committee extends its appreciation to those Ministers and contact persons who provided that assistance. In particular, the Committee would like to thank Steven Elliot and his colleagues from the Department of Local Government and Communities, who act as a most valuable filter in dealing with problematic draft local laws before they are formally made, thus resolving many of those problems before a law is gazetted and referred to the Committee, and also James McGovern of WALGA, a valued source of information and expertise.

²³ *Shire of Donnybrook-Balingup Cat Local Law 2016*, clause 3.2.

²⁴ *Local Government Amendment (Cats) Local Law 2015*, published 24 July 2015.

²⁵ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 83, *Annual Report 2015*, 18 February 2016, paragraphs 6.22–6.26.

- 7.2 The current membership of the Committee notes the important oversight role it has fulfilled and the scrutiny work it has undertaken on behalf of the 39th Parliament. It is hopeful that the enthusiasm and vigour with which it has carried out its functions continues in the 40th Parliament.



Mr Peter Abetz MLA
Chairman

16 November 2016

APPENDIX 1

LETTER FROM TREASURER DATED 4 NOVEMBER 2016



Hon Mike Nahan MLA
Treasurer; Minister for Energy;
Citizenship and Multicultural Interests

Our ref: 48-19409
Your ref: 3973.04/KO

Mr Peter Abetz
Chairman
Joint Standing Committee on Delegated Legislation
GPO Box A11
PERTH WA 6837

Dear Mr Abetz

MOTOR VEHICLE (CATASTROPHIC INJURIES) REGULATIONS 2016

Thank you for your letter dated 13 October 2016 regarding the Joint Standing Committee on Delegated Legislation's (Committee) further consideration of the *Motor Vehicle (Catastrophic Injuries) Regulations 2016* (Regulations).

I reiterate my previous advice that, based on the assessment of a participant's necessary and reasonable treatment, care and support needs, a Client Plan detailing the treatment, care and support required is to be documented.

This is done in partnership with the participant, their family and treating health team. The Client Plan is then reviewed periodically and/or as needs change.

The Client Plan sets out the treatment, care and support needs that have been assessed as necessary and reasonable, and details the services to be provided, how often they will be provided, the providers of the services and the cost of the services.

Under section 18(1) of the *Motor Vehicle (Catastrophic Injuries) Act 2016*:

*"The Insurance Commission **must** pay for all necessary and reasonable **expenses** incurred by or on behalf of a person in relation to a person's **assessed** treatment, care and support needs, while the person is a participant in the CISS".*

Consequently, the Commission must pay for any assessed expenses at the rate specified for the services. Any dispute with a service provider will be managed in line with the terms of the service provision arrangements. A dispute between the Insurance Commission and a person or their family, if it were to arise, would be in

relation to the assessment, rather than the payment of the expenses Disputes of that nature are already catered for through the review process.

The Commission has drafted Guidelines, and is fine tuning those Guidelines to cater for the variety of circumstances anticipated to be encountered in administering the scheme. I am advised the Insurance Commission aims to release the Guidelines by the end of the calendar year.

I remain satisfied that in the context that 'Convenor' and 'Deputy Convenor' appear in the Regulations, there can be no doubt as to their meaning.

It is my view that there is no great merit in considering amendments to the Regulations that have no material effect and I am satisfied that the Regulations will work as intended.

I would be pleased to offer the committee a detailed briefing from Commission officials on the Regulations, arranged through my office, if this would be of assistance.

Yours sincerely



**DR MIKE NAHAN MLA
TREASURER; MINISTER FOR ENERGY;
CITIZENSHIP AND MULTICULTURAL INTERESTS**

04 NOV 2016