THIRTY-EIGHTH PARLIAMENT

REPORT 31

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN 1 MAY 2007 AND 30 APRIL 2009 WITH RESPECT TO LOCAL LAWS

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Kim Chance MLC (Deputy Chairman)

May 2009

Date first appointed:

28 June 2001

Terms of Reference:

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

3. Joint Standing Committee on Delegated Legislation

3.1 A *Joint Standing Committee on Delegated Legislation* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.

3.4 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.

3.5 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.

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

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness;

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

3.7 In this clause -

"**adverse effect**" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"**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 as at the time of this inquiry:

Mr Joe Francis MLA (Chairman)
Hon Kim Chance MLC (Deputy Chairman)
Hon Shelley Eaton MLC
Ms Janine Freeman MLA
Hon Ray Halligan MLC
Mr Paul Miles MLA
Hon Barbara Scott MLC
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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN 1 MAY 2007 AND 30 APRIL 2009 WITH RESPECT TO LOCAL LAWS

1 INTRODUCTION

1.1 The current Joint Standing Committee on Delegated Legislation was established at the commencement of the 38th Parliament. Successive Committees, with similar Terms of Reference, have been established at the commencement of each Parliament since 1987. The term "**Committee**" is used to identify all the former Joint Standing Committees on Delegated Legislation and the current Joint Standing Committee on Delegated Legislation. If it is appropriate to distinguish between them, the particular Joint Standing Committee on Delegated Legislation is identified by reference to the Parliament during which it served.

1.2 As has previously been reported, one of the major initiatives in which the Committee was involved during the 36th Parliament was the establishment of a working group of local law stakeholders **(Working Group)**, comprising:

- representatives from the Department of Local Government and Regional Development;
- representatives from the Local Government Managers Australia (WA Division);
- representatives from the Western Australian Local Government Association **(WALGA)**; and
- staff members of the Committee.

1.3 This is the fifth report in a series of reports that the Committee has tabled since 2003,[1] identifying and discussing issues of concern in respect of local laws, with a view to improving the dissemination of previously confidential, informal information that is prepared for the Working Group. This report sets out the major issues arising from local laws scrutinised by the Committee between 1 May 2007 and 30 April 2009, which fell in the 37th and 38th Parliaments.[2]

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1 All previously tabled local law information reports are publicly available on the internet at www.parliament.wa.gov.au under the tab "Past Committees".

2 The current Committee has had access to the documents and records of the previous Committee in the preparation of this report.

2 STATISTICS

2.1 Between 1 May 2007 and 30 April 2009, the Committee considered[3] 212 local laws. Of these local laws:

- 90 were considered between 1 May 2007 and 31 December 2007; and
- 122 were considered between 1 January 2008 and 30 April 2009.

2.2 As the Committee stated in its Report No. 22, *Annual Report 2006*, it is the practice of the Committee to:

> *obtain undertakings from the responsible Minister, Department or local government to amend or repeal instruments with which the Committee has raised a concern. When such undertakings are given, the Committee usually does not proceed with any motion to disallow that may have been tabled. Should the Committee wish to proceed, it does so by reporting to the Parliament, recommending the disallowance of instruments in the Legislative Council. The Committee only recommends disallowance as a last resort.*[4]

2.3 During the reporting period, the Committee received undertakings to amend 27 local laws. Therefore, the Committee identified significant problems - having regard to its Terms of Reference - with some 13% of local laws considered during the reporting period. A number of other problems with local laws of a less serious nature, such as minor drafting errors, were also brought to the attention of local governments throughout the reporting period without the need for written undertakings to amend.

2.4 During the reporting period, the Committee recommended that the Legislative Council disallow two local laws as follows:

- the *Town of Claremont Standing Orders Local Law 2007* was disallowed by the Legislative Council on 21 February 2008; and
- the Committee tabled Report No. 29 on 2 April 2009 recommending the disallowance of the *City of Armadale - Signs Amendment Local Law 2008*. This motion of disallowance must be resolved in the Legislative Council no later than 7 May 2009. However, as this is outside the

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3 As distinct from the number of disallowable instruments "referred" to the Committee as set out in Report No. 30, *Annual Report 2008*, 14 May 2009, paragraph 3.7.

4 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 22, *Annual Report 2006,* 28 March 2007, paragraph 2.4.

reporting period, only one local law was actually disallowed during the reporting period.

2.5 During the reporting period, the Committee also tabled two information reports, Report No. 26, *Issues Arising under Health Local Laws* and Report No. 28, *Local Laws Regulating Signs and Advertising Devices.*

3 COMPLIANCE WITH UNDERTAKINGS

3.1 In its Report No. 23, *Issues of Concern Raised by the Committee Between 1 May 2006 and 30 April 2007 with Respect to Local Laws*, the Committee noted that 36 written undertakings to amend local laws provided to the Committee by local governments prior to 4 December 2004 remained outstanding.

3.2 The Committee undertook a further review of compliance with written undertakings in December 2008. It found that:

- nine undertakings remained outstanding from 2008;
- thirteen undertakings remained outstanding from 2007;
- four undertakings remained outstanding from 2006; and
- seven undertakings remained outstanding from 2005.

3.3 The time taken by local governments to comply with written undertakings remains a concern to the Committee. In its recent review, the Committee found that the average time taken for local governments to comply with undertakings is:

- 15% are completed within six months;
- 36% are completed within 12 months; and
- 46% are completed within two years.

4 WORKING GROUP

4.1 The Working Group last met on 3 December 2007, when participants also included two members of the previous Committee, Mr Paul Andrews MLA (then Chairman) and Mr Tony Simpson MLA, and two representatives from the Department of Health, which monitors and reviews proposed health local laws. Three members of the Committee's staff also attended the meeting.

4.2 This meeting provided an opportunity for the Committee's representatives to discuss many of the issues set out in this report and for the other participants to

advise the Committee of issues attracting their attention. The Committee was pleased to be advised by WALGA that it was conducting a review of its Model Local Laws. The Committee subsequently provided WALGA with a list of the issues it had identified in the current Models.

4.3 The Committee was also pleased to receive an offer from the Department of Local Government and Regional Development **(Department)** to assist in monitoring compliance with undertakings provided by local governments to the Committee to amend or repeal local laws that the Committee had been found to be problematic.

4.4 The Committee subsequently resolved to advise the Department of any new undertakings provided by a local government to enable it to ascertain whether that undertaking had been met when a draft amendment of a local law was presented by a local government for its comment. The Committee has also recently provided the Department with a list of historical undertakings.

4.5 The Working Group did not meet in 2008 due to the prorogation of Parliament on 7 August 2008. The Committee of the 37th Parliament held its last meeting on 25 June 2008. There were no further Committee meetings until the current Committee held its first and only meeting for 2008 on 3 December 2008.

4.6 It is anticipated that the Working Group will next meet in the second year of the 38th Parliament.

5 DRAFTING STYLES IN LOCAL LAWS

Enacting Provisions

5.1 In its Report No. 23, *Issues of Concern Raised by the Committee Between 1 May 2006 and 30 April 2007 with Respect to Local Laws*, tabled on 7 June 2007, the Committee drew attention to errors in enacting provisions. This continued to be a problem during the current reporting period. For example, a local law gazetted on 13 April 2007 contained the following enacting provision:

> *The Council of the Shire of Donnybrook-Balingup resolved to make the following local law on* ***(date)****.* [Committee's emphasis]

5.2 In this instance, the local government merely copied the text of the relevant WALGA model local law which sets out various fields such as dates to be inserted by the particular local government, without inserting the actual date that its Council resolved to make the local law.

5.3 The Committee reminds local governments of the need to insert information relevant to a particular local law when using WALGA Models as a template for their local laws.

Drafting Errors

5.4 The Committee also draws attention to the following common drafting errors in local laws:

- obsolete reference to (or reliance on) provisions of the repealed *Town Planning and Development Act 1928*;
- incorrect references to the *Liquor Licensing Act 1988*, which is now titled the *Liquor Control Act 1988*; and
- incorrect references to Schedules in the local law, either by referring to Schedules that do not exist or, where there is more than one Schedule, reference to the wrong Schedule number.

5.5 Some of these defects rendered provisions of the relevant local law ineffective. The Committee reminds local governments of the need to update references to legislation, and ensure internal consistency, when using the WALGA Model local laws, or local laws of other local governments, as a template for their own local laws.

Gazettal by Reference

5.6 As set out below at paragraphs 8.15 and 8.16, the *Shire of Dowerin Fencing Local Law 2008* adopted and modified the *Shire of Goomalling Local Law Relating to Fencing 2007* by reference only. Section 3.8(3) of the *Local Government Act 1995* states that a local law may adopt by reference, wholly or in part, the text of a local law of another local government .

5.7 However, in adopting the *Shire of Goomalling Local Law Relating to Fencing 2007* by reference, the Shire of Dowerin did not take into account an undertaking that the Shire of Goomalling had previously provided to the Committee to amend a problematic clause of its local law. Unfortunately, as the Shire of Dowerin did not modify the particular clause of the Shire of Goomalling's local law, it formed part of the Shire of Dowerin's local law.

5.8 The Committee draws this example to the attention of local governments to illustrate the disadvantage of adopting the local laws of another local government by reference only. Care must be taken to ensure that the local law being adopted is not the subject of an undertaking to the Committee to amend or repeal clauses. If so, the local law of another local government may still be

adopted by reference, albeit with all modifications clearly set out to avoid 'inheriting' problematic clauses from other local laws.

6 SIGNS LOCAL LAWS

6.1 A major issue for the Committee during the reporting period was the extent to which the *Local Government Act 1995* authorises the making of local laws relating to signs and advertising devices having regard to the provisions of the *Planning and Development Act 2005* and section 3.7 of the *Local Government Act 1995* (which provides that a local law is inoperative to the extent of any inconsistency with any other written law).[5]

6.2 This question first arose in the *Town of Victoria Park - Signs Local Law 2006* and *City of Armadale - Signs Local Laws 2007.* It subsequently arose in the *Shire of Harvey - Local Law Relating to Signs and Other Advertising Devices 2007* and the *City of Nedlands - Signs Local Law 2007.* The Committee concluded that the power to make signs local laws was limited.

6.3 In light of the general application of this question to signs local laws, and the need for a comprehensive inquiry into the particular local laws, the Committee resolved to proceed by way of tabling an information report to Parliament, rather than recommending disallowance of individual local laws relating to signs and advertising devices. That report is the Committee's Report No. 28 - *Local Laws Regulating Signs and Advertising Devices,* tabled on 2 April 2009.[6]

7 CREATION OF CRIMINAL OFFENCES

Subjective and vague standards of behaviour

7.1 In its Report No. 23, the Committee drew attention to its concerns with subclause 30(5) of the *City of Fremantle Parking Local Law 2006*, which provided:

> *A person shall not drive a vehicle in a parking station so as to cause any person present in or near the parking station apprehension of danger to such driver, such person present, or any other person, or apprehension of damage or injury to any property.*

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5 The Committee takes the view that the *Local Government Act 1995* does not authorise the making of inoperative local laws.

6 The Committee subsequently resolved to recommend disallowance of the *City of Armadale - Signs Amendment Local Law 2008* as the City of Armadale's failure to provide an undertaking to address the Committee's concerns with the principal local law led to the amendment local law attempting to amend an ineffective principal local law. See, Joint Standing Committee on Delegated Legislation, Report No. 29, *City of Armadale - Signs Amendment Local Law 2008,* 2 April 2009.

7.2 The Committee noted that the general formulation of such a prohibition in criminal law is that a person must not:

- cause actual danger; or
- threaten danger so as to cause a genuine, and reasonably based, apprehension that danger will eventuate.

The Committee concluded that mere apprehension of danger was too subjective and too vague to form a basis for a legal obligation. For that reason the provision was not, in the Committee's opinion, authorised or contemplated by the *Local Government Act 1995*.

7.3 During the current reporting period, the Committee scrutinised another local law raising a similar issue.[7] Subclause 2.1(h) of the *City of Perth Thoroughfares and Public Places Local Law 2007* provided that a person shall not:

> *use or allow to be used a bicycle or wheeled recreational device on a thoroughfare so as to cause a nuisance or to endanger,* ***intimidate*** *or unduly obstruct or hinder any other person or vehicle lawfully using* ***or intending to use*** *the same area;* [Committee's emphasis]

7.4 The Committee noted that whether or not a person felt intimidated was subjective, and might not be reasonable from an objective viewpoint. It also noted that in rendering a person criminally liable for failure to anticipate that another "*intends*" to use the same area that the first person uses, the City of Perth attempted to impose criminal liability in circumstances not envisioned under the *Criminal Code* or common law principles. The Committee considered that this subclause was not authorised or contemplated by the *Local Government Act 1995*.

7.5 Both the City of Fremantle and City of Perth provided an undertaking to amend their respective local laws to reflect the Committee's conclusions and not to enforce the relevant provisions in the interim.

Imposition of liability on persons for acts/inaction of others

City of Fremantle Parking Local Law 2006

7.6 In its Report No. 23, the Committee also raised issues with clause 35 of the *City of Fremantle Parking Local Law 2006*. That clause made an adult criminally liable for failing to prevent a minor in the adult's charge from vandalising, or

[7] That local law was gazetted prior to the tabling of the Committee's Report No. 23.

attempting to vandalise, parking station equipment. The Committee pointed out that this clause did not fall within any of the limited exceptions to the common law principle that a person is criminally responsible only for acts performed, or participated in, by that person.[8]

7.7 The Committee noted that in describing the conduct required for participation in an offence Cussen ACJ, said, in R v Russel [1933] VR 59, after referring to terms such as "*aiding*" and "*abetting*":[9]

> *All the words abovementioned are, I think, instances of one general idea, that the person charged as a principal in the second degree is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission.*

7.8 The Committee also noted that section 7 of the *Criminal Code* reflects the common law position in providing:[10]

> *When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —*
>
> > *(a) Every person who actually does the act or makes the omission which constitutes the offence;*
> >
> > *(b) Every person who does or omits to do any act* ***for the purpose*** *of enabling or aiding another person to commit the offence;*
> >
> > *(c) Every person who aids another person in committing the offence;*
> >
> > *(d) Any person who counsels or procures any other person to commit the offence.*

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8 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 23, *Issues of Concern raised by the Committee between 1 May 2006 and 30 April 2007 with respect to Local Laws,* 7 June 2007, paragraphs 7.9-7.16.

9 Ibid, paragraph 7.12.

10 Ibid, paragraph 7.13.

Health Local Laws

7.9 In its Report No. 26, *Issues Arising under Health Local Laws*, the Committee expressed its view that clauses in health local laws to the effect:

> *Where in any clause contained in this Part a duty is imposed upon the occupier of premises in or upon which an offensive trade is carried on, the reference to the occupier shall be interpreted to include the employees of the occupier and any employee committing a breach of any provision of this Part shall be liable to the same penalties as if he were the occupier...*

were unauthorised as they were inconsistent with common law principles of personal responsibility in criminal law. The Committee expressed the view that:

> *if the Parliament intended to create a clause that imposed liability on an employee for a range of occupier's duties, many of which the employee would be unlikely to have the capacity to effect, it would have done so expressly in the Act.* [11]

City of Fremantle - Local Law Relating to Outdoor Eating Areas Amendment Local Law 2007

7.10 The issue of imposition of criminal responsibility on employees in circumstances not clearly authorised by empowering legislation again arose in the *City of Fremantle - Local Law Relating to Outdoor Eating Areas Amendment Local Law 2007.* That local law prohibits smoking in a licensed Outdoor Eating Area. Clause 4(d)(ii) provides:

> *Where a licensee or employee of an eating house is aware or could reasonably be expected to be aware that a person is smoking in a licenced area, then the licensee or employee shall:*
>
> *A inform the person smoking that the person is committing an offence; and*
>
> *B request the person to leave the licensed area until the person has finished smoking.*

7.11 Clause 12 of the local law provides:

> *A person who commits a breach of these local laws commits an offence and is liable on conviction to a maximum penalty of:*

$2,000 in the case of a breach of local law 4(c) or 4(d).

7.12 The Committee noted that in regulations made under the *Tobacco Control Act 2006*, an occupier may be held to have committed an offence in the event that no request to cease smoking was made when a person smoked in an enclosed area but that:

> ***"occupier"**, in relation to an enclosed public place, means a person having the management or control, or otherwise being in charge, of that place*[12];

not a non-management employee.

7.13 This provision (albeit authorised by different empowering legislation) and the similar provisions in offensive trades health local laws discussed in Report No. 26, reflect the Committee's view that the imposition of responsibility on a licensee in the circumstances of the *City of Fremantle Local Law Relating to Outdoor Eating Areas Amendment Local Law 2007* does fall within the ambit of what is contemplated by the *Local Government Act 1995* in a local law for the good governance of the persons in a district. In the Committee's opinion, such a provision is akin to a licensing condition requiring the licensee to take steps to ensure that local laws are adhered to in operating the business.

7.14 However, the imposition of legal responsibility on an employee, on threat of criminal sanction, to ensure compliance with local laws appeared to the Committee to fall outside this category. In effect it turns employees of an Outdoor Eating House business into local government enforcement officers. The Committee noted that the *Local Government Act 1995* contains detailed provisions concerning the appointment of persons authorised to enforce local laws, which does not include the co-option of employees of such businesses. The Committee was particularly concerned with the impact of this provision on young staff, who may be under 18 years of age.

7.15 The Committee also noted that this provision was outside the usual principles of criminal responsibility, and not within any recognised exceptions to those principles, in that it was directed at a person who had not engaged in the targeted offending behaviour. As with the health local law provisions discussed above, the Committee was of the view that if Parliament had intended local governments to have the power to make such provisions in their local laws, it would have conferred that power in an Act.

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11 Paragraphs 2.1 and 3.7-3.10.

12 Regulation 7, *Tobacco Products Control Regulations 2006.*

7.16 The Committee advised the City of Fremantle of its conclusion that clauses in a local law making an employee criminally responsible for failing to take issue with a smoker's unlawful behaviour are not authorised or contemplated by the *Local Government Act 1995*. The Committee required the City of Fremantle to amend clause 4(d) to delete the imposition of liability on employees. The City provided an undertaking to amend the clause and not enforce that provision in the interim.

City of Joondalup - Trading in Public Places Amendment Local Law 2008

7.17 This amendment local law (**the Joondalup local law**) was considered by the Committee on 6 April 2009. The Explanatory Memorandum provided to the Committee by the City of Joondalup stated that it used the *City of Fremantle - Local Law Relating to Outdoor Eating Areas Amendment Local Law 2007* as a model.

7.18 The Joondalup local law amends the principal local law to prohibit smoking in a licensed outdoor dining area, and like the Fremantle local law, to require a "*licensee or employee*" of an eating house who is aware, or could reasonably be expected to be aware, that a person is smoking to inform the person that smoking is an offence and require the person to leave the area until they have finished smoking (clause 14(4)(ii)).

7.19 The Joondalup local law also provided that:

> *The **proprietor** commits an offence if requirements under clause 14(4)(ii) are not complied with. (Clause 14(4)(iii));*

7.20 Clause 50 of the Joondalup local law provides:

> *A person who fails to do anything required or directed to be done under this local law, or who does anything which under this local law that person is prohibited from doing, commits an offence.*

and imposes a penalty of $5,000.

7.21 "*Proprietor*" in the Joondalup local law :

> *(a) includes the owner, the occupier and any person having the management or control of any eating house; or*
>
> *(b) the holder of a licence granted under the Liquor Act where the premises in question is the subject of an hotel licence, a limited hotel licence, special facility licence or a restaurant licence granted under that Act.*

7.22 The City of Joondalup local law goes further than the Fremantle local law in imposing criminal responsibility on persons for the acts of others, as the "*proprietor*", who may or may not be the licensee, and may or may not be involved in the business, is made guilty of an offence if the licensee or employee fails to take issue with a patron smoking.

7.23 This clause offends the general common law principle that a defendant is responsible for an offence only if he or she personally performed, or participated in, the conduct prescribed and did so with the requisite mental element. The Committee concluded that there is no express (or necessarily implied) authority to depart from the common law principle in the empowering legislation.

7.24 The Committee sought an undertaking from the City of Joondalup to repeal the relevant provisions regarding proprietors, and to amend the relevant provisions regarding employees in accordance with the earlier City of Fremantle local law, and not rely on or enforce them in the interim.

Conclusion

7.25 The Committee reminds local governments that, absent an authorising provision in empowering legislation, the general power to make local laws conferred by sections 3.5 and 3.1 of the *Local Government Act 1995,* for the good governance of persons in a district does not authorise imposition of criminal liability in circumstances not contemplated by the *Criminal Code* or the common law.

8 ISSUING NOTICES FOR ENTRY ONTO PRIVATE LAND

8.1 In the 36th Parliament, the Committee tabled Report No.7, *Powers of Entry and Powers to Make Local Laws that Affect Private Land under the Local Government Act 1995*, triggered by concerns that local laws sought to:

- regulate the activities of owners or occupiers of private land conducted on that land; and
- authorise local government employees to enter onto that land

in certain circumstances that went beyond the matters listed in Schedules 3.1 and 3.2 of the Act.

8.2 The Committee concluded that:

> *the local law-making power provided by section 3.5(1) of the Act is constrained by sections 3.25*[13] *and 3.27;*[14] *and*

[13] Section 3.25 of the *Local Government Act 1995* provides:

accordingly where a local government relies on section 3.5(1) for making a local law in relation to entry onto private land, the local government:

> *(a) is restricted to the matters specified in Schedules 3.1 and 3.2; and*
>
> *(b) must comply with the procedures for entering private land set out in Part 3, Division 3, Subdivision 3 of the Act.*

8.3 However, during the reporting period, a number of gazetted local laws continued to contain provisions relating to the issuing of notices to owners or occupiers of private property, and entry onto private property, that were not authorised by the *Local Government Act 1995*.

Example - Fencing Local Laws

8.4 In its Report No. 7, the Committee drew attention to the WALGA model fencing local law. Clause 16 of the WALGA Model allows a local government to:

- issue a notice to an owner to repair a fence on private property in the event that the fence breached the requirements of a local law (for example where it was dilapidated or unsightly); and
- in the event the notice was not complied with, enter onto private property to remedy any breach of the local law, and recover the costs of doing so from the owner or occupier.

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(1) A local government may give a person who is the owner or, unless Schedule 3.1 indicates otherwise, the occupier of land a notice in writing relating to the land requiring the person to do anything specified in the notice that —

> *(a) is prescribed in Schedule 3.1, Division 1; or*
>
> *(b) is for the purpose of remedying or mitigating the effects of any offence against a provision prescribed in Schedule 3.1, Division 2.*

(2) Schedule 3.1 may be amended by regulations. (3) If the notice is given to an occupier who is not the owner of the land, the owner is to be informed in writing that the notice was given.

[14] Section 3.27 of the *Local Government Act 1995* provides:

(1) A local government may, in performing its general function, do any of the things prescribed in Schedule 3.2 even though the land on which it is done is not local government property and the local government does not have consent to do it. (2) Schedule 3.2 may be amended by regulations.

8.5 The Committee noted that clause 16 was in conflict with the *Local Government Act 1995* which, in 2003, provided power to issue notices for repair of fences only in item 4 of Schedule 3.1. That item allows a local government to issue a notice to an owner of private land that is adjoined to a public place to:

- ensure that the private land is suitably enclosed to separate it from the public place; and

- where applicable, ensure that the private land is enclosed with a fence, to the satisfaction of the local government, which is suitable to prevent sand or other matter on the private land from going onto the public place.

8.6 By item 4(2) of Schedule 3.1 of the *Local Government Act 1995*, notices could not be given to an occupier who was not also an owner.

8.7 Following the tabling of the Committee's Report No. 7, Schedule 3.1 of the *Local Government Act 1995* was amended to add item 12, which provides power for a local government to issue a notice to an owner to:

> *Ensure that an unsightly, dilapidated or dangerous fence or gate that separates the land from land that is local government property is modified or repaired.*

8.8 However, local governments continue to make local laws that exceed this extended authorisation, as illustrated by the following instances.

Shire of Goomalling - Local Law Relating to Fencing 2007

8.9 This local law repeated in its clause 15(3), clause 16 of the WALGA model local law. As power to issue notices, and enter onto property in the event of failure to comply with a notice, was not confined to an "*unsightly, dilapidated or dangerous fence or gate*" abutting land that is local government property, the clause did not fall within the new item 12 of Schedule 3.1 of the *Local Government Act 1995.*

8.10 The Shire of Goomalling therefore provided an undertaking to amend the local law and not enforce the relevant provision in the interim.

City of Nedlands - Fencing Local Law 2007

8.11 This local law did not adopt clause 16 of the WALGA model local law but its relevant provision raised the same issues. Clause 14 of this local law provides:

> *(1) An owner or occupier of a lot on which a fence is erected shall maintain the fence in good condition and so as to prevent it from becoming dangerous, dilapidated, or unsightly.*
>
> *(2) Where in the opinion of an authorised officer, a fence is in a state of disrepair or is otherwise in breach of a provision of this local law, the City may give notice in writing to the owner or occupier of the land upon which the fence is erected, requiring the owner or occupier to modify, repair, paint or maintain the fence within the time specified in the notice.*
>
> *(3) An owner or occupier who fails to comply with a notice issued under Part 6 commits an offence.*

8.12 Similarly, clause 20 of this local law states:

> *(1) Where a breach of any provision of this local law has occurred in relation to a fence on a lot, the City may give notice in writing to the owner or occupier of that lot (Notice of Breach);*

8.13 The Committee concluded that these clauses were in conflict with items 4 and 5 of Schedule 3.1 of the *Local Government Act 1995* in purporting to confer power to issue notices to an occupier who was not also an owner. The Committee was also of the view that clause 20 was not authorised as it also purported to confer power to issue notices to rectify fences that did not abut local government property.

8.14 The City of Nedlands provided an undertaking to amend its local law to address these (and other) problems raised by the Committee and not to enforce the relevant provisions in the interim.

Shire of Dowerin Fencing Local Law 2008

8.15 More recently, the Shire of Dowerin gazetted a local law on 26 September 2008 that adopted and modified the *Shire of Goomalling Local Law Relating to Fencing 2007* by reference only. As discussed at paragraph 5.7, because the Shire of Dowerin did not modify clause 15(3) of the Shire of Goomalling's local law as set out in paragraph 8.10 above, it formed part of the Shire of Dowerin's local law.

8.16 The Shire of Dowerin therefore provided an undertaking to the Committee to amend its local law in the same manner as the Shire of Goomalling with respect to clause 15(3).

Conclusion

8.17 The Committee wrote to the former Minister for Local Government alerting her to the fact that clause 16 of the WALGA model fencing local law continued to be reflected in local laws. The Minister advised that the Department would liaise with local governments to bring this matter to their attention. The Committee also included this matter in its letter to WALGA advising it of issues arising in respect of its model local laws.[15]

8.18 The Committee takes this opportunity to remind local governments of the limits to the circumstances in which local laws conferring power on a local government to issue notices for remedy of breach, and enter onto private property to rectify a breach, are authorised.

9 HEALTH LOCAL LAWS - UNREASONABLENESS AND OUSTER CLAUSES

9.1 During the reporting period, the Committee scrutinised two health local laws, the *Shire of Broome Health Local Law 2006* and *Shire of Cuballing Health Local Laws 2007*, which raised long-standing issues of unreasonableness in the terms of a clause and ouster of a local government's liability for actions taken pursuant to health local laws.

9.2 These issues were identified and explained in the 36th Parliament in Report No. 8, *Issues of Concern Raised by the Committee Between 9 June 2003 and 19 December 2003 with Respect to Local Laws.* In summary, the Committee noted in that report that many of the health local laws it had reviewed contained clauses that were equivalent to the following:

- providing:

  A person shall not place or cause to be placed in or on any premises, and an owner or occupier of premises shall not permit to remain in or on the premises -

  (a) any food, refuse or other waste matter which might attract rodents to the premises or which might afford harbourage for rodents; or

  (b) any food intended for birds or other animals, unless it is contained in a rodent proof receptacle or a

[15] The Committee also drew the attention of the former Minister for Local Government and WALGA to issues arising from clause 4 of the WALGA model fencing local law. Again, the then Minister advised that the Department of Local Government and Regional Development would bring the Committee's concerns to the attention of local governments.

compartment, which is kept effectively, protected against access by rodents (**the first clause**)*;* and

- providing that where the local government conducts works to eradicate, control, or prevent the breeding of flies, mosquitoes or other pests, or clean, disinfect, disinfest, or sanitise premises or things:

  The local government shall not be liable to pay compensation or damages of any kind to the...[the person served with the notice] ...in relation to any action taken by the local government under this section (**the second clause**).

9.3 The Committee considers that the first clause, and clauses that are equivalent to it, are unreasonable in that they potentially prohibit both of the following situations:

- serving food for human consumption on plates or bowls, which are then placed on tables or bench tops or some other surface; and

- the usual method of feeding pets by means of placing pet food into a bowl or some other open container that can be accessed by the pet.

9.4 The Committee considers that the second clause, and clauses equivalent to it:

- are void for inconsistency with section 9.56(4) of the Local Government Act 1995;[16]

- remove a fundamental right to sue a local government for a cause of action recognised by the common law or statute, when such clauses are not authorised by the *Health Act 1911* or any other Act;

- may also be void for inconsistency with section 259 of the *Health Act 1911*.[17] Section 259 of the *Health Act 1911* provides that the owner of any building, animal, or thing that is destroyed by direction of the Executive Director, Public Health or the local government under Part IX (Infectious Diseases) is entitled to compensation to the extent and subject to the conditions provided for in that section; and

- offend the Committee's Terms of Reference 3.6(a), (b), (d) and (f).

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16 Pursuant to section 43(1) of the *Interpretation Act 1984.*

17 Pursuant to section 342(5) of the *Health Act 1911* and section 43(1) of the *Interpretation Act 1984.*

9.5 As reported in Report No. 8, the former Minister for Health provided an undertaking on 17 November 2003 to utilise the power under section 343B of the *Health Act 1911* (the Governor's power to make a local law amending or repealing health local laws) to globally amend these types of clauses to address the Committee's concerns. During its review of undertakings in December 2006 and January 2007, the Committee inquired as to progress in implementing this undertaking.

9.6 The Committee was advised by the then Minister for Health and the Department of Health that there had been a poor response in 2004 from local governments to requests for advice as to whether their local laws contained the identified clauses (or clauses with similar effect).[18] The Committee was advised that the matter had then been set aside due to other work commitments, without an effective bring-up mechanism having been put in place.[19]

9.7 The process for gazettal of a local law under section 343B of the *Health Act 1911* was recommenced in 2007. In the event, the Department of Health identified 100 local governments that had made local laws containing relevant problematic clauses.

9.8 Both Broome and Cuballing Shires gave undertakings to the Committee not to rely on the relevant clauses in their health local laws pending gazettal of the anticipated local law made under section 343B of the *Health Act 1911.*

9.9 The *Health Local Laws 2007* was gazetted on 7 September 2007. That local law deleted the various versions of the problematic clauses found in health local laws and inserted the following clauses:

- for the first clause:

  A person must not store, or allow to be stored, on any premises, any food, refuse or other waste matter unless it is contained in a rodent proof receptacle or compartment.

- for the second clause:

  The local government is not liable to pay compensation or damages of any kind to the owner or occupier of premises in relation to any action taken by the local government or any of its staff under this clause, other than compensation or damages

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18 The former Minister for Health advised that this was necessary to enable effective drafting instructions to be given by the Department of Health.

19 Letter from the former Minister of Health to the Committee dated 17 May 2007, p.1.

for loss or damage suffered because the local government or any of its staff acted negligently or in breach of duty.

9.10 The *Health Local Laws 2007* addresses the Committee's concerns with these clauses.

10 OTHER ISSUES ARISING UNDER HEALTH LOCAL LAWS

10.1 In its Report No. 26 (**Report**)[20] tabled on 20 March 2008, the Committee raised two areas of concern in relation to clauses in health local laws.

10.2 The first issue, the imposition of criminal liability on an employee for the duties of an occupier, has been discussed at paragraph 7.9 above.

10.3 The second issue related to the use of the term 'obnoxious' in clauses setting out the types of goods or materials that were not to be kept in a lodging house by a lodger or resident.

10.4 The Committee was concerned that the term was open to subjective interpretation, and as such, its meaning was not sufficiently clear enough to:

- provide consistency in the application and enforcement of the local law; and
- ensure any individual who may be affected by the clause would be able to discern its meaning.

10.5 The Committee recommended that the Minister invoke section 343B of the *Health Act 1911* to amend health local laws to:

- delete clauses imposing liability on employees for the duties of an occupier; and
- prescribe a meaning for the term obnoxious or alternatively delete the term.

10.6 The former Minister for Health responded to the Report accepting the conclusions and recommendations it contained. A copy of this response is attached as Appendix 1.

10.7 The Committee noted that, as at 29 April 2009, health local laws had not been amended as recommended in the Report. Given the change of Government in 2008 the Committee resolved to write to the current Minister for Health to

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20 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 26, *Issues Arising Under Health Local Laws*, 20 March 2008.

clarify the progress of the response and to confirm that the Committee's recommendations will be implemented by the current Government.

11 SMOKING LOCAL LAWS

11.1 In 2008, the Committee scrutinised two local laws which prohibited smoking in stipulated public areas. These were the:

- *City of Fremantle - Local Law Relating to Outdoor Eating Areas Amendment Local Law 2007*, which prohibited smoking in outdoor eating areas licensed by the Council (see paragraphs 8.6 to 8.14 above); and

- *City of Joondalup - Local Government and Public Property Amendment Local Law (No 2) 2007*, which prohibited smoking on the City's beaches.

11.2 The Committee spent considerable time scrutinising these local laws as they were the first of their kind in Western Australia, and involved issues of significant public interest; namely an individual's right to smoke, versus the public health imperative of local governments ensuring smoke-free public places.

12 DOGS LOCAL LAWS - PROVISION INCONSISTENT WITH *EQUAL OPPORTUNITY ACT 1984*

12.1 The *Shire of Menzies Dogs Local Law 2007* and *Shire of Gnowangerup Dogs Local Law 2007* contained a common provision, clause 5, prohibiting dogs from certain public places. In the *Shire of Menzies Dogs Local Law 2007,* this included places where signs are placed prohibiting their presence and at swimming pools.

12.2 Section 51 of the *Dog Act 1976*, when read with section 49, empowers local governments to make local laws specifying places where dogs are prohibited absolutely. However, section 8 of the *Dog Act 1976* provides that notwithstanding anything in a local law, it is not an offence for a blind or partially blind person to be accompanied by a guide dog in public places.

12.3 Further, section 66J of the *Equal Opportunity Act 1984* prohibits discrimination on the ground of impairment in access to public places and section 66A(4) of that Act defines "*discrimination on ground of impairment*" to include treating a blind, deaf, partially blind or partially deaf person less favourably on the basis of being accompanied by a guide or hearing dog, whether or not it is the practice of the discriminator to treat less favourable any persons accompanied by a dog.

12.4 The *Equal Opportunity Act 1984* stipulates, in Division 4 of Part IVA, the circumstances in which its provisions concerning discrimination on the grounds of impairment will not apply and confers power on the Governor to make regulations specifying exceptions within limited circumstances.

12.5 Section 43(1) of the *Interpretation Act 1984*, which has previously been referred to in this report, provides:

> *Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency.*

12.6 It is a principle of statutory interpretation that, where possible, Acts should be interpreted so as to be consistent with each other.[21] The Committee concluded that sections 49 and 51 of the *Dog Act 1976* do not authorise the making of provisions in local laws that are inconsistent, or in conflict, with section 8 of that Act or the *Equal Opportunity Act 1984.*

12.7 The Committee wrote to the Shire of Menzies and the Shire of Gnowangerup requiring undertakings to amend clause 5 of their respective dogs local laws to render them consistent with section 8 of the *Dog Act 1976* and section 66J of the *Equal Opportunity Act 1984,* and not to enforce those clauses in the interim. Both Shires provided the required undertakings.

12.8 As such clauses were common in dogs local laws, the Committee also wrote to the Department of Local Government and Regional Development to alert it to the issue. The Department's response was:

> *The Department is of the understanding that clause 5 of the Shire of Menzies Local Law 2007* (sic) *(which is similar to the Model Local Law) is valid in that it is enacted pursuant to section 51(b) of the Act. Section 8 of the Act makes it clear that in the event of any inconsistency, section 8 of that Act will take precedence.*[22]

12.9 The Committee is not persuaded that the *Dog Act 1976* authorises or contemplates that the local law-making powers it confers will be used to make provisions that are rendered ineffective by section 8 of that Act or void by operation of the *Equal Opportunity Act 1984* and section 43(1) of the

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[21] Pearce, D and Geddes, R, *Statutory Interpretation in Australia,* 5th ed, Butterworths, Sydney, 2001.

[22] Letter from Mr Ross Weaver, Acting Director General, Department of Local Government and Regional Development, dated 19 November 2007. The Department's response does not address the inconsistency between the provision and the *Equal Opportunity Act 1984.*

Interpretation Act 1984. To conclude otherwise would, in the Committee's opinion, result in an absurdity.

12.10 Until a provision in subsidiary legislation is disallowed by Parliament, or declared invalid or unauthorised by a court of competent jurisdiction, that provision has ostensible effect. The presence of provisions having no legal effect can mislead members of the public in identifying their responsibilities and rights, impacting on their legitimate expectations. Therefore, in the Committee's opinion, such provisions should be removed where identified.

12.11 Notwithstanding its view, the Department of Local Government and Regional Development undertook to communicate the Committee's conclusions to local governments that submitted to it dogs local laws for review.

12.12 However, since May 2008, the Committee has sought three further undertakings from local governments to amend clause 5 to expressly state that the absolute prohibition of dogs in public places is subject to section 8 of the *Dog Act 1976* and section 66J of the *Equal Opportunity Act 1984*.

12.13 The Committee urges local governments and the Department to ensure that all future gazetted dogs local laws contain this qualification regarding guide dogs in clause 5.

13 SUBSIDIARY LEGISLATION IMPACTING UPON LOCAL LAWS

Local Government (Rules of Conduct) Regulations 2007

13.1 The *Local Government (Rules of Conduct) Regulations 2007*, giving effect to Division 9 of Part 5 of the *Local Government Act 1995*, were gazetted on 21 August 2007.

13.2 The Committee had a number of concerns with this instrument, including:

- the wide import of the term "*relating to*" in regulation 4(1);
- difficulty in identifying the obligations imposed by regulation 6, and whether they were consistent with existing obligations in the circumstances that sections 5.24, 5.94 and 5.95 of the Act imposed a series of similar (but not identical) obligations which were subject to exceptions and provisos to those exceptions, and that had to be read in conjunction with provisions of the *Local Government (Administration) Regulations 1996*. Also, whether an apparent conferral of power on the Chief Executive Officer (CEO) of a local government to characterise some information before a closed council meeting as confidential and some as not confidential was consistent with the Act's scope of a CEO's power over council proceedings;

- regulation 8 was widely drafted and applied in circumstances wider than those the Department of Local Government and Regional Development advised it was intended to address, and appeared to sub-delegate power to determine how local government resources were to be allocated to the CEO without clear authorisation in the Act; and
- regulations 9(1) and 10(1) could operate to restrict the flow of information necessary for the good governance of the people of the district and could conflict with section 5.41(e) and (f) of the Act in respect of the power conferred on the CEO.

13.3 The Committee raised these concerns with the Department of Local Government and Regional Development on two occasions. On the second occasion, the Department provided a copy of advice received from the State Solicitor's Office (SSO), which asserted that the various concerns were not justified.

13.4 The Committee was concerned at some inconsistencies between the way the Department and SSO explained the regulations as operating. It was also concerned that the Department's position in some respects appeared to be that if there were authorisation problems with aspects of the legislation, they could be rectified by administrative procedure. This did not seem to the Committee to be satisfactory. However, in its response to the Committee's letter outlining it concerns, WALGA advised that it was generally satisfied with the regulations.

13.5 In light of WALGA's response, the Committee resolved not to proceed to recommend disallowance of the regulations but wrote to the former Minister for Local Government drawing attention to the Committee's concerns for consideration during the planned review of the *Local Government (Rules of Conduct) Regulations 2007.*

14 CONCLUSION

14.1 The Committee's report is intended as a means for assistance and guidance to local governments in formulating local laws.

14.2 The Committee acknowledges the assistance it receives from the Department of Local Government, the Department of Health, and the various local governments, in resolving the issues that arise from time to time.

Mr Joe Francis MLA
Chairman

Date: 14 May 2009

APPENDIX 1

GOVERNMENT RESPONSE TO REPORT 26

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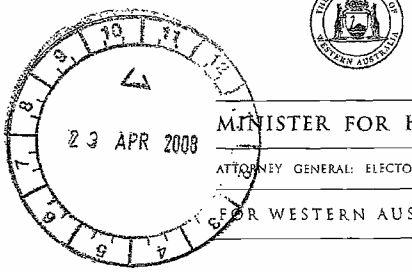
GOVERNMENT RESPONSE TO REPORT 26

Our Ref: 4-47242



MINISTER FOR HEALTH
ATTORNEY GENERAL; ELECTORAL AFFAIRS
FOR WESTERN AUSTRALIA

Mr Paul Grant
Clerk Assistant (Committees)
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr Grant

I refer to your letter dated 20 March 2008 requiring response, under Legislative Council Standing Order 337, to the recommendations contained in the report of the Joint Standing Committee on Delegated Legislation (the Committee) *Report No.26: Issues Arising Under Health Local Laws* (the Report), as tabled in the Legislative Council on 20 March 2008.

The Report has been considered and the conclusions and recommendations set out in Part 5 are accepted and, in that respect, section 343B of the *Health Act 1911* is to be invoked to effect the necessary amendments to those local government Health Local Laws identified as containing provisions having similar effect to those specified in recommendations 1 and 2 of the Report.

With regard to Recommendation 2 of the Report, the word "obnoxious" is to be deleted rather than defined.

As part of the section 343B process, all local governments will now need to be contacted in order to identify whether their health local laws contain the offending provisions, so that the text or repeal of the actual provision can be appropriately dealt with.

It is anticipated that the required changes, as recommended in the Report, will be implemented within three months from the date of this advice.

Yours sincerely

JIM McGINTY MLA
MINISTER FOR HEALTH

21 APR 2008

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