THIRTY-EIGHTH PARLIAMENT

REPORT 38

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN 1 MAY 2009 AND 31 DECEMBER 2009 WITH RESPECT TO LOCAL LAWS

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

April 2010

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:

"**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)	Ms Janine Freeman MLA
Hon Robin Chapple MLC (Deputy Chairman)	Hon Alyssa Hayden MLC
Hon Jim Chown MLC	Mr Paul Miles MLA
Hon Jock Ferguson MLC	Mr Andrew Waddell MLA

Staff as at the time of this inquiry:

Christine Kain, Advisory Officer (Legal)	Irina Lobeto-Ortega, Advisory Officer (Legal)
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ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN 1 MAY 2009 AND 31 DECEMBER 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;
- 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 sixth 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 2009 and 31 December 2009.

2 STATISTICS

2.1 Between 1 May 2009 and 31 December 2009, 58 local laws were referred to the Committee.

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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".

2.2 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.*[2]

2.3 During the reporting period, the Committee received undertakings to amend 13 local laws. Therefore, the Committee identified significant problems - having regard to its Terms of Reference - with some 22 per cent 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 one local law, the *City of Joondalup Cats Local Law 2008*. (See Report No. 34).

2.5 During the reporting period, the Committee also tabled three information reports:

- Report No. 30, *Annual Report 2008*;
- Report No. 31, *Issues of Concern Raised by the Committee between 1 May 2007 and 30 April 2009 with respect to Local Laws*; and
- Report No. 37, *Unauthorised Disclosure of Confidential Committee Correspondence by the City of Joondalup*.

3 COMPLIANCE WITH UNDERTAKINGS

3.1 In December 2009, the Committee undertook a review of compliance with written undertakings previously provided to it. It found that:

- seventeen undertakings remained outstanding from 2009;
- six undertakings remained outstanding from 2008;
- twelve undertakings remained outstanding from 2007;

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[2] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 22, *Annual Report 2006,* 28 March 2007, paragraph 2.4.

- four undertakings remained outstanding from 2006; and
- seven undertakings remained outstanding from 2005.

Undertakings online

3.2 As foreshadowed by the Committee's Report No. 30[3], all local government undertakings are grouped together on the *Parliament of Western Australia* Internet site, thus increasing public access to the Committee's decisions.[4] This initiative also serves the following purposes:

- It is a point of reference for local governments and their advisers to ascertain systemic problems with a particular local law and what amendments the Committee has required a local government to make in order for the local law to be valid.
- It enables the Department of Local Government to trace local governments' compliance with undertakings and thus enhance good governance.

4 WORKING GROUP

4.1 The Working Group did not meet during the reporting period. It is anticipated that the next meeting will be early in 2010.

5 DRAFTING STYLES IN LOCAL LAWS

5.1 In its Report No. 31, *Issues of Concern Raised by the Committee between 1 May 2007 and 30 April 2009 with respect to Local Laws*, tabled on 14 May 2009, the Committee drew attention to errors in enacting provisions, drafting errors such as obsolete reference to or reliance on repealed legislation, and incorrect references to Schedules in local laws.

5.2 The Committee is pleased to note that the number of drafting errors in local laws has significantly reduced during this reporting period.

6 CATS LOCAL LAWS

City of Joondalup Cats Local Law 2008

6.1 A significant issue for the Committee during the reporting period was the gazettal of the *City of Joondalup Cats Local Law 2008* on 2 April 2009. The Committee had a

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3 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 30, *Annual Report 2008*, May 2009.

4 The Internet site may be viewed at www.parliament.wa.gov.au. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then at *Committee Details,* scroll down to *Local Government Undertakings.*

number of concerns in relation to this Local Law including clause 7 which read as follows:

> *All registered cats within the City shall be sterilised except cats owned by residents in possession of written approval from the City to keep up to 6 adult breeding cats in accordance with clause 45(2) of the City's Animals Local Law 1999.*[5]

6.2 The Committee formed the view that clause 7 was not authorised or contemplated by the *Local Government Act 1995* and, further, that it was a provision which would be more appropriately contained in an Act. As such, the Committee found that clause 7 offended its *Terms of Reference* 3.6(a) and 3.6(f).

6.3 The Committee sought undertakings from the City of Joondalup in relation to its concerns. Whilst the City of Joondalup was prepared to provide some of the undertakings requested by the Committee, the following issues remained outstanding:

- sterilisation;
- requirements in relation to the wearing of registration tags by cats; and
- offence provisions in relation to the presence of cats in prohibited areas.

6.4 A series of correspondence was exchanged culminating in the Committee tabling a report in the Legislative Council recommending disallowance of the *City of Joondalup Cats Local Law 2008*.[6]

6.5 The *City of Joondalup Cats Local Law 2008* was subsequently disallowed in the Legislative Council on 15 September 2009.

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5 Clause 6 of the *City of Joondalup Cats Local Law 2008* requires registration of cats as follows:

(1) All cats within the City shall be registered by 31 October each year except:

(i) cats under the age of 3 months;

(ii) cats kept during the period when the owner is applying for registration;

(iii) cats in the custody of an animal welfare group;

(iv) cats held by a registered veterinary surgeon in the course of his or her professional practice;

(v) cats kept in any cattery.

(2) Subject to clause 6(1), if a cat is not registered under this Local Law, the owner of the cat commits an offence.

Penalty: $500

6 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 34, *City of Joondalup Cats Local Law 2008,* September 2009.

6.6 The *City of Albany Keeping and Welfare of Cats Local Law 2008* was gazetted on 9 June 2009. The Committee's concerns in relation to this Local Law were:

- Clauses 4.2(e) and 4.5 of the Local Law required, in the absence of a permit, sterilisation as a prerequisite to compulsory registration. These issues were canvassed in the Committee's Report No. 34.[7]

- Clause 3.1 included "occupier" in the definition of "keeper", potentially imposing liability for certain offences on an occupier of a premises who may have no connection to the cat in question.

- Defences found in the Local Law applied only to one of the offences in the Local Law.

- The Local Law did not provide for individuals to apply to the City of Albany to have their details omitted from the register for their own protection or that of their family.

- Persons under the age of 18 were not permitted to register a cat.

6.7 "Keeper" is defined in clause 3.1 of the *City of Albany Keeping and Welfare of Cats Local Law 2008* as meaning:

> *the owner of the Cat, occupier of the dwelling where the Cat is normally kept or the last person recorded as the registered owner;*

6.8 The Committee noted that as a result of the above definition, a person who has no connection to the cat in question but shares a house with someone who owns or feeds and cares for a cat on a regular basis, is liable for the above offences. Clause 10 of the Local Law provided a defence for a keeper in the limited circumstances of contravention of a permit.

6.9 The Committee formed the view that the imposition of criminal liability in the above circumstances was not authorised by sections 3.1 and 3.5 of the *Local Government Act 1995*.

6.10 The Committee noted that it is a fundamental principle of criminal law that liability for an offence depends upon the presence of requisite elements, which consist primarily of a prescribed form of conduct accompanied by a prescribed form of mental state or fault on the part of the accused.

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7 Ibid.

6.11 The common law in this area is reflected in section 7 of the *Criminal Code*:

> *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.*

6.12 The Committee stated in its Report No. 31 that:

> *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]

6.13 The Committee sought undertakings from the City of Albany in relation to its concerns with the *City of Albany Keeping and Welfare of Cats Local Law 2008.* In relation to the definition of keeper in clause 3.1 the Committee required that clause 3.1 be amended to further define occupier to read:

> *...the occupier of the dwelling where the cat is normally kept who has care and control of the cat*

6.14 The required undertakings were provided by the City of Albany on 14 August 2009 and 14 October 2009.

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[8] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 31, *Issues of Concern Raised by the Committee Between 1 May 2007 and 30 April 2009 With Respect To Local Laws,* May 2009, p.12 paragraph 7.25.

7 LOCAL GOVERNMENT PROPERTY LOCAL LAWS

Determination Devices in Local Government Property Local Laws

7.1 An ongoing issue for the Committee during the reporting period was the use of determination devices in local government property local laws. The Local Laws Manual published by the Western Australian Municipal Association in 1997 contains a Model Local Government Property Local Law.[9]

7.2 The Committee's position in relation to determination devices is set out below.

7.3 A determination device is a means by which a 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, subject to certain procedural and administrative procedures being followed to publicise any such resolution.

7.4 The Committee's historical position on determination devices is that it does not support such devices in principle on the basis that:

- Parliamentary scrutiny is avoided; and
- the determination may amount to a sub-delegation of legislative power.

7.5 The use of determinations avoids scrutiny by the Parliament. This is because the mandatory procedure for making a local law under section 3.12 of the *Local Government Act 1995* is not required to be followed in order to make, repeal or amend a determination. The determination device also by-passes the requirements of section 42 of the *Interpretation Act 1984* in relation to publication of the determination in the *Gazette*, tabling in both Houses of Parliament and disallowance.

7.6 It is the Committee's view that it could not have been the intention of Parliament for the procedures contained in section 3.12 of the *Local Government Act 1995* and section 42 of the *Interpretation Act 1984* to be avoided. Any local law that attempts to evade scrutiny by the Parliament via the Committee is not authorized by the *Local Government Act 1995*, is inconsistent with the *Interpretation Act 1984* and is invalid.

7.7 There is also an argument that determinations amount to a sub-delegation of legislative power, since determinations are made by a simple majority of council members, whereas local laws must be made by an absolute majority of council members under section 3.12(4) of the *Local Government Act 1995*.

7.8 In the absence of legislative authority to the contrary, there is a common law rule against sub-delegation of legislative power. This rule is based on the principle that a

[9] WAMA, *Local Laws Manual,* WAMA Policy Division, 1997, Perth, section 2, p219.

body that has been delegated the power to make legislation cannot itself delegate this power.[10] Local governments have been delegated the power to make local laws by the Parliament enacting section 3.5(1) of the *Local Government Act 1995*. That is, local governments are not permitted to delegate this power to make local laws to another body unless authorised to do so by the *Local Government Act 1995* or another Act.

City of Stirling Thoroughfares and Public Places Local Law 2009

7.9 The *City of Stirling Thoroughfares and Public Places Local Law 2009* was gazetted on 9 April 2009. The Committee had concerns with clause 2.7 which dealt with permissible verge treatments.

7.10 Clause 2.7(1) provided that an owner or occupier of land which abuts on a verge may on that part of the verge directly in front of his or her land install a permissible verge treatment. Clause 2.7(2) sets out what is a permissible verge treatment. The Committee considered sub-clause (c) to be problematic. That clause stated that a permissible verge treatment is *"the installation of an acceptable material or other verge treatment as determined by the City under a policy:"* (Emphasis added).

7.11 Clause 2.7(2)(c) provided the City with a general, unlimited power to make a determination under a policy in relation to permissible verge treatments. The Committee was of the view that the City of Stirling is not permitted to delegate its power to make local laws to another body unless authorised to do so by the *Local Government Act 1995* or another Act.

7.12 The Committee sought an undertaking from the City of Stirling that the clause be repealed or the words *"or other verge treatment as determined by the City under a policy"* be deleted or, alternatively, the clause be amended to list the permissible verge treatments.

7.13 The City of Stirling provided an undertaking on 19 August 2009 to delete the words *"or other verge treatment as determined by the City under a policy"*.

City of Stirling Local Government Property Law 2009

7.14 The City of Stirling included in its local government property law two determinations which were not authorised under Division 2 of Part 2 of the *City of Stirling Local Government Property Law 2009*.[11] That division is entitled *'Activities which may be*

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10 For example, see *Hawke's Bay Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board* [1961] NZLR 218; *Turner v Owen* (1990) 96 ALR 119.

11 The determinations in question were as follows:

2.6 Activities prohibited on local government property

(5) Unless authorised by a permit or by an authorised person, a person must not take a glass container—

pursued or prohibited under a determination' and contains the heads of power under which determinations may be made.

7.15 The Committee, based on the views expressed in paragraphs 7.1 to 7.8, considers that the use of determination devices within local government property local laws should not be extended beyond those currently found in the Model Local Law.[12]

7.16 In this instance the determinations were not authorised under the existing heads of power and the Committee sought an undertaking from the City of Stirling that they be deleted. That undertaking was subsequently provided by the City.

Use of the term decency

7.17 The Committee considered the use of the term "decency" in two local government property laws set out below.

7.18 Clause 1.3 of the *City of Gosnells Local Government Property Law* 2009 contained the following definition of decency:

> ***"decency"*** *means wearing of proper and adequate clothing for the occasion, so as to prevent indecent exposure.*

7.19 Clause 4.6 sets out requirements for behaviour on Local Government property being:

4.6 Decency and adequate clothing

(a) on to Reserve 12992 (beach and coastal reserve);

(b) within 5m of the edge of a swimming pool on local government property;

(c) on to a children's playground; or

(d) within any area of local government property where a sign prohibits glass containers.

2.8 Umbrellas and temporary shade structures

A person may erect an umbrella or temporary shade structure on local government property that is not enclosed, only if, it—

(a) is erected for protection from the sun or other elements;

(b) has an area of 6m^2 or less;

(c) has a height of 2.5m or less;

(d) is removed by that person immediately on leaving the local government property;

(e) is for private use; and

(f) is not erected for advertising or promotional purposes unless in accordance with a permit or other prior authorisation given by the City.

[12] This view has also been held by previous Committees. See Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 4, *City of Perth Code of Conduct Local Law,* September 2002, p.49. See also discussion in *Local Laws Manual*, section 2, p.205 and section 6, pp.9-12.

> *(1) A person over the age of 6 years shall not on or in any local government property:*
>
> *(a) appear in public unless properly dressed in clothing which covers the body to prevent indecent exposure;...*
>
> *... ((2) Where an authorised person considers that the clothing of any person on local government property is not proper and adequate to secure decency, the authorised person may direct that person to put on adequate clothing and that person shall comply with that direction immediately.*

7.20 Similarly the *City of Stirling Local Government Property Law* 2009 contained the following clause:

> ***9.5 Decency of dress***
>
> *Where an authorised person considers that the clothing of any person on local government property is not proper and adequate to secure decency, the authorised person may direct that person to put on adequate clothing and that person is to comply with the direction immediately.*

7.21 In both of the examples above, a failure to comply with a direction of an authorised person was an offence. The Committee was cognisant of the fact that a modified penalty could be imposed for these offences. It was the Committee's view that the use of the term 'decency' in both of the local laws was open to subjective interpretation and as a result could be applied inconsistently.

7.22 The Committee sought undertakings that the Local Laws be amended to provide a definition of decency which clearly defined what constitutes proper and adequate clothing in both the swimming pool setting and on other local government property. Those undertakings were subsequently provided by the Cities of Gosnells and Stirling.

8 STANDING ORDERS LOCAL LAWS

8.1 The Committee considered a number of Standing Orders Local Laws during the reporting period which were problematic. These were the:

- *Southern Metropolitan Regional Council Standing Orders Local Law 2008*
- *City of Wanneroo Standing Orders Local Law 2008*
- *Shire of Bridgetown-Greenbushes Standing Orders Local Law 2008*
- *City of Albany Standing Orders Local Law 2009*

8.2 The Committee observed that the *Southern Metropolitan Regional Council Standing Orders Local Law 2008, City of Wanneroo Standing Orders Local Law 2008* and the *City of Albany Standing Orders Local Law 2009* shared problematic clauses.

8.3 Shared problematic clauses (with slight modifications in phrasing) were:

- **Clause 4.8 - Presiding person to be heard without interruption**

  Whenever the presiding person either rises or signifies a desire to speak during a meeting, any member speaking or offering to speak must sit down and be silent, so that the presiding person may be heard without interruption.

- **Clause 4.12 - Presiding person to draw attention of meeting to unbecoming behaviour**

  The presiding person may call the attention of a meeting to—

  (a) continued irrelevance;

  (b) tedious repetition;

  (c) unbecoming language; or

  (d) any breach of order or decorum,

  on the part of a member, and may direct the member, if speaking, to cease speaking. Upon receiving such direction the member must comply immediately and be seated.

8.4 These clauses are not contained in the Model Local Law. The Committee was concerned that the clauses are superfluous as their content is already substantially addressed in other clauses such as 4.5 (Members not to interrupt); 4.11 (Relevance to debate); 4.16 (Preservation of order - members); and 5.11(3) (Questions during debate).[13]

8.5 Clause 15.8 of the WALGA Model Local Law confers similar powers as clauses 4.8 and 4.12 on the presiding person to be heard without interruption and requiring another speaking member to stop speaking and sit down immediately, but only when points of order have been raised; not in general council debate.

8.6 The Committee was of the view that given that the substantive content of these clauses is addressed in other clauses of the local laws, they appear to confer unnecessary and subjective powers on the presiding person, potentially limiting the capacity of elected

[13] Note: Clauses reflect the *City of Albany Standing Orders Local Law 2009*.

members to participate fully in Council meetings, contrary to section 2.10 of the *Local Government Act 1995*, which expressly states that the role of a councillor is to participate in the local government decision making processes at council and committee meetings. The clauses also appear to be limiting the right of freedom of political communication as implied in the Commonwealth *Constitution*.

8.7 The Committee sought undertakings that these two clauses be deleted.

- **Clause 4.15(3) - Point of order**

  The presiding person is to decide all points of order and the decision of the presiding person is final and must be accepted by the meeting without argument or comment, unless in any particular case, the meeting then resolves that a different ruling is to be substituted for the ruling given by the presiding person.

8.8 Again, the Committee noted that this sub-clause is not contained in the WALGA Model Local Law, and as with clauses 4.8 and 4.12, it appears to confer subjective and excessive powers on the presiding person, potentially limiting the capacity of elected members to participate fully in Council meetings, and limiting the right of freedom of political communication.

8.9 The Committee sought an undertaking that the sub-clause be amended by deleting the words *"and must be accepted by the meeting without argument or comment"* after the word *"final"*.

- **Clause 4.16(3) - Preservation of order - members**

  Where a member persists in any conduct which the presiding person has ruled to be out of order, or refuses to make any explanation, retraction or apology required by the presiding person, then ***the presiding person may direct the member to refrain from taking any further part in that meeting,*** *other than to have their vote recorded and the member must comply with that direction.* (Emphasis added).

8.10 Again, this subclause is not contained in the WALGA Model Local Law. The Committee was concerned that it may effectively silence elected members by denying them the opportunity to fully participate in Council meetings. It also confers on the presiding person a subjective power to deem when members' conduct warrants them to be directed to refrain from taking any further part in the meeting; not confined to the matter under discussion, as is the case in the WALGA Model Local Law.

8.11 This outcome is inconsistent with section 3.1 of the *Local Government Act 1995* which provides that the general function of a local government is to provide for the good government of persons in the district, as it undermines the fundamental

principles of democratic local government. There is no power in either the Act or the Regulations for presiding persons to direct members to refrain from taking part in any part of meetings. Indeed, as set out above, section 2.10 of the Act expressly states that the role of a councillor is to participate in the local government decision making processes at council and committee meetings. The Committee was of the view that this subclause is in breach of section 2.10 of the Act.

8.12 The Committee sought an undertaking that the subclause be amended by deleting the words *"that meeting"* after the words *"part in"* and insert the words *"the debate of the item";*.

- **Clause 5.11(3) - Questions during debate**

  Where the presiding person considers that a question asked is not succinct and to the point, but is prefaced by comment or other information or is rhetorical in nature, the presiding person may rule that the member has spoken and must not speak again on the same matter.

8.13 Again, this subclause is not contained in the WALGA Model Local Law. As with the other problematic clauses, the Committee was concerned that it potentially denies elected members the opportunity to fully participate in Council meetings, and confers on the presiding person a subjective power to deem when members' questions are not "succinct and to the point", with the consequence that they may be deemed to have spoken on the matter and not be permitted to speak again on the matter.

8.14 The Committee sought an undertaking to delete the subclause.

8.15 The Committee also sought an undertaking from the Southern Metropolitan Regional Council that it would insert a clause preserving elected members' question time, or at least a clause that preserves the authority for members to ask questions of which due notice has been given.

8.16 The problematic clauses in the *Shire of Bridgetown-Greenbushes Standing Orders Local Law 2008* related to notice of meeting provisions, limitation on freedom of political expression, errors in references to clauses, and drafting errors.

8.17 As at December 2009, the Committee had received undertakings from all of the relevant local government authorities to amend their Standing Orders Local Law in accordance with the Committee's requests. The City of Wanneroo and the Southern Metropolitan Regional Council gazetted their amendments in September 2009 and November 2009 respectively.

9 SHORT STAY ACCOMMODATION

City of Fremantle Short Stay Accommodation Local Law 2008

9.1 The *City of Fremantle Short Stay Accommodation Local Law 2008* (Local Law) was gazetted on 18 December 2008 and was made under the *Local Government Act 1995* pursuant to the general power in section 3.1 of that Act. The Local Law commenced on 18 March 2009.

9.2 The Local Law creates a registration scheme for short stay accommodation within the City of Fremantle. An application for registration must be accompanied by the required details which include:[14]

- provision of a floor plan;
- the allocation and number of bedrooms to be used for accommodation; and
- if more than four occupants are proposed - an onsite parking bay.

9.3 The Local Law also imposes conditions on registration, including on-site parking bay requirements.[15]

9.4 On 6 February 2009 the City's Local Planning Scheme No. 4 was amended to, among other things, exempt short stay accommodation for not more than six occupants from the requirement to obtain planning approval.

9.5 On 2 April 2009 the Committee tabled its Report No. 28, *Local Laws Regulating Signs and Advertising Devices*. In that report the Committee reached the conclusion that the *Local Government Act 1995* does not authorise the making of local laws that, in effect, canvass matters intended by the *Planning and Development Act 2005* to be dealt with in local planning schemes. [16]

9.6 The Local Law was first considered by the Committee on 4 May 2009. Following an exchange of correspondence with the City of Fremantle the Committee formed the view that parts of the *City of Fremantle Short Stay Accommodation Local Law 2008* canvassed planning matters intended by the *Planning and Development Act 2005* to be dealt with in local planning schemes.

9.7 The Committee notes that in September 2009 the West Australian Planning Commission published *Guidelines for Holiday Homes - Short stay use of residential*

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14 Clause 2.4 *City of Fremantle Short Stay Accommodation Local Law 2008.*

15 Ibid, Clause 2.6.

16 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 28, *Local Laws Regulating Signs and Advertising Devices*, 2 April 2009.

dwellings[17] (**Guidelines**). Standard holiday homes (defined as including use as short stay accommodation for no more than six people) are covered by the Guidelines.

9.8 Clause 3.1 of the Guidelines sets out conditions which may be included in planning applications for holiday homes. These conditions include a management plan which may include nomination of a manager/caretaker, details of how nuisance issues may be dealt with and a fire and emergency plan. This clause also relevantly includes the following paragraph:

> *Other matters such as car parking provision, signage, the number of people occupying the premises, maximum period of stay can be imposed as part of the planning approval and subsequently enforced as pursuant to the Planning and Development Act 2005.*

9.9 The Committee resolved to take no further action in relation to the *City of Fremantle Short Stay Accommodation Local Law 2008*, however the Committee wishes to make clear that this Local Law should not be used as a precedent. The Committee will in the future, in keeping with its conclusions in its Report No. 28, recommend disallowance of local laws that canvass matters intended by the *Planning and Development Act 2005* to be dealt with in local planning schemes.[18]

10 DEFINITION OF MEDIAN STRIP

10.1 The *Town of Victoria Park Parking and Parking Facilities Local Law 2008* contained a provision of "median strip" which was inconsistent with the definition in the *Road Traffic Code 2000.*

10.2 The Town's definition was:

> ***'median strip'*** *means any provision, dividing a road to separate vehicular traffic proceeding in opposing directions or to separate 2 one-way carriageways for vehicles proceeding in opposing directions;*

10.3 The *Road Traffic Code 2000* defines median strip as:

> ***median strip*** *means any physical provision, other than lines, dividing a road to separate vehicular traffic proceeding in opposing directions or to separate 2 one-way carriageways for vehicular traffic proceeding in opposing directions;* (Emphasis added).

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17 Viewed at http://www.planning.wa.gov.au/Plans+and+policies/Publications/1981.aspx 23 March 2009.

18 In these circumstances the Committee would follow its usual practice of seeking an undertaking to amend the local law prior to recommending disallowance.

10.4 The Committee was advised that the Department of Local Government alerted the Town to the inconsistency. The Town of Victoria Park rejected the advice of the Department, stating:

> *the Town's rangers and Technical services Staff specifically wanted the word 'physical" removed as the Town intends for that definition to apply to painted lines on median strips. The Town is not bound by the definitions contained in the Code and can define things as it deems fit for the purposes of the local law.*

10.5 This position is incorrect. Section 3.7 of the *Local Government Act 1995* states:

> *3.7. Inconsistency with written laws*
>
> *A local law made under this Act is inoperative to the extent that it is inconsistent with this Act or any other written law.*

10.6 Under the *Interpretation Act 1984*, written law means:

> *all Acts for the time being in force and all subsidiary legislation for the time being in force;*

10.7 Additionally, under section 100 of the *Road Traffic Act 1974*, that Act and its Code apply to every local government:

> *This Act applies to persons and vehicles in the public service of the Crown, or of any local government*

10.8 The Committee found that the definition in the *Town of Victoria Park Parking and Parking Facilities Local Law 2008* is inconsistent with the *Road Traffic Code* and therefore inoperative.

10.9 The Committee wrote to the Town on 12 May 2009 seeking a written undertaking to redraft the definition so as to be consistent with the *Road Traffic Code 2000.* This undertaking was provided the following day.

10.10 The Committee also wrote to the Minister for Transport expressing its concern that this instrument reflects a broader trend within local government to include a definition of "*median strip*" in local laws that permits the painting of lines on roads. The Committee sought advice from the Minister as to whether he was considering amending the definition of "*median strip*" in the *Road Traffic Code 2000* so that local governments may use painted lines instead of physical structures to divide a road.

10.11 On 27 July 2009, the Minister replied to the Committee's letter advising that "... at present there is no plan to amend the definition of *"median strip"* in the *Road Traffic Code*".

10.12 The Committee will maintain a watching brief in relation to this matter.

11 WASTE LOCAL LAWS

11.1 The Committee considered two waste local laws during the reporting period which were the first examples of waste local laws made under the *Waste Avoidance and Resource Recovery Act 2007*.[19]

11.2 The purpose of the local laws is to provide for the administration of waste services, the establishment, provision, use and control of receptacles for the deposit and collection of waste and related matters.

11.3 Many of the clauses in both local laws are based on the clauses in Part 4, Division 2 (Waste Food and Refuse - Disposal of Refuse) of the standard health local laws passed by most local governments pursuant to the *Health Act 1911*. The relevant waste management provisions from the *Health Act 1911* have been repealed and replaced by the *Waste Avoidance and Resource Recovery Act 2007*.

11.4 The Committee noted that the Shire of Broomehill-Tambellup gazetted a health local law on 20 March 2009 which did not contain the 'waste food and refuse - disposal of refuse' provisions. Therefore, there was no duplication of waste local laws in the Shire.

11.5 The Committee noted a number of minor typographical errors in both local laws.

11.6 The Committee also noted a problem with clauses 2.8(2)(d), 2.9(3)(a) and 2.14(2)(d) of both local laws, which provided as follows:

> ***2.8. Use of Other Containers***
>
> …
>
> *(2) The owner or occupier of premises who is authorised under this clause to deposit waste in a container shall—*
>
> *(d) cause the container to be located on the premises in an* ***enclosure constructed and located as approved*** *by the local government;*
>
> ***2.9. Suitable Enclosure***
>
> …

[19] *Shire of Broomehill-Tambellup Waste Services Local Law 2009*, gazetted 7 July 2009 and *Shire of Northam Waste Local Law 2009*, gazetted 28 July 2009.

> *(3) For the purposes of this clause, a "suitable enclosure" means an enclosure—*
>
> *(a) of sufficient size to accommodate all receptacles used on the premises but in any event* ***having a floor area not less than a size approved*** *by the local government;*
>
> ***2.14. Burning Waste***
>
> ...
>
> *(2) Subject to subclause (3), an approval of the local government is issued subject to the following conditions—*
>
> *(d) an incinerator must meet the* ***standards specified*** *by the local government;*
>
> (Emphasis added)

Clauses 2.8(2)(d), 2.9(3)(a) and 2.14(2)(d)

11.7 The Committee considered that clauses 2.8(2)(d), 2.9(3)(a) and 2.14(2)(d) should prescribe the requirements which must be met for certain matters. Instead, the clauses leave these requirements to the approval or specification of the relevant Shire. Pursuant to section 5.20 of the *Local Government Act 1995*, these approvals and specifications can be made by a simple majority of the relevant Shire.

11.8 In the absence of legislative authority to the contrary, there is a common law rule against sub-delegation of legislative power.[20] This rule is based on the principle that a body that has been delegated the power to make legislation cannot itself delegate this power. Local governments have been delegated the power to make waste local laws by the Parliament enacting sections 61 and 64 of the *Waste Avoidance and Resource Recovery Act 2007* and section 3.5(1) of the *Local Government Act 1995*. The Committee was of the view that the Shires are not permitted to delegate this power to make waste local laws to another body, or a differently constituted Council, unless authorised by an Act.

11.9 The Shires are required to follow the steps listed in section 3.12 of the *Local Government Act 1995* in order to make, amend or repeal a local law.[21] That includes the requirements of, for example, advertising the proposed local law by way of

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[20] For example, see *Hawke's Bay Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board* [1961] NZLR 218; *Turner v Owen* (1990) 96 ALR 119.

[21] See section 3.11 of the *Local Government Act 1995* and section 61 of the *Waste Avoidance and Resource Recovery Act 2007*.

Statewide and Local Public Notices, an absolute majority[22] of Council to pass the local law and publication in the *Government Gazette*. For example, a local law is not validly made if a simple majority, rather than an absolute majority, passes it.

11.10 The requirements of section 3.12 are mandatory in the sense that a failure to strictly comply with any of them will render a local law inoperative under section 3.7 of the *Local Government Act 1995* (and, in the case of waste local laws, section 61(8) of the *Waste Avoidance and Resource Recovery Act 2007*), and void for inconsistency with the *Local Government Act 1995* and the *Waste Avoidance and Resource Recovery Act 2007* under section 43(1) of the *Interpretation Act 1984*.[23]

11.11 It was the Committee's view that by adopting clauses 2.8(2)(d), 2.9(3)(a) and 2.14(2)(d) of these local laws, the Shires have in effect sub-delegated their local law making power to a simple majority of their respective Councils. This sub-delegation is not authorised by any Act; rather, it is inconsistent with section 3.12 of the *Local Government Act 1995*.

11.12 The Committee concluded that these local laws are inoperative and void to the extent of the inconsistency.

11.13 Further, the Committee found that clauses 2.8(2)(d), 2.9(3)(a) and 2.14(2)(d) of the local laws were so vague as to be of no legal effect. The Committee was of the view that the clauses ought to provide the residents of the Shires with adequate instructions as to the requirements for the matters that are being dealt with in each clause.

11.14 With regard to clause 2.8(2)(d), it appeared to the Committee that the specifications for the construction and location of enclosures which house containers (other than receptacles[24]) could be the same as the specifications for the 'suitable enclosures' which house receptacles, rather than leaving these details to be 'approved' by the relevant Shire. The specifications for 'suitable enclosures' are prescribed in clause 2.9(3) of this local law. Significantly, clauses 2.8 and 2.9 apply to the same types of premises, that is:

- premises which consist of more than three dwellings,
- premises used for commercial or industrial purposes; and

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22 As defined in sections 1.4 and 1.9 of the *Local Government Act 1995*.

23 Opinion, Crown Solicitor's Office to Department of Local Government and Regional Development, 31 January 2002.

24 'Receptacles' are defined as follows: *"where used in connection with any premises means— (a) a polyethylene cart fitted with wheels, a handle and a lid and having a capacity of at least 120 litres; or (b) a container provided by the local government or its contractor for the deposit, collection and recycling of specific materials; and supplied to the premises by the local government or its contractor"*: clause 1.2 of these local laws.

- food premises.[25]

Clause 2.9(3)(d)(ii)

11.15 The Committee also noted a problem with clause 2.9(3)(d) which provided as follows:

> ***2.9. Suitable Enclosure***
>
> *(3) For the purposes of this clause, a "suitable enclosure" means an enclosure—*
>
> *(d) containing a smooth, non-slip and impervious floor—*
>
> *(i) of not less than 75 millimetres in thickness; and*
>
> *(ii) which is evenly graded to an* ***approved liquid refuse disposal system****;*
>
> (Emphasis added)

11.16 Clause 2.9(3)(d)(ii) exhibits the same issues of uncertainty and, potentially, the unauthorised sub-delegation of legislative power. It leaves the specification of the required liquid refuse disposal system to be 'approved', but it does not indicate who must give the approval. It may be that the system must conform to an external standard, such as the Building Code of Australia or an Australian Standard. If so, the Committee was of the view that this clause should adopt the relevant standard by reference. If not, and if the approval must be given by the local government, the clause should list the required specifications of the system.

11.17 The Committee notes that clauses 2.8(2)(d), 2.9(3)(a) and 2.9(3)(d)(ii) have been inherited from the standard health local laws which were passed by most local governments pursuant to the *Health Act 1911*. Clause 2.14(2)(d) is a new provision.

Clause 2.14(3)

11.18 The Committee noted that in the *Shire of Broomehill-Tambellup Waste Services Local Law 2009* clause 2.14(3) stated that *"Subject to the local fire rules, the local government may grant approval to clear by burning fire breaks or vacant blocks of grass, straw, hay, undergrowth, herbage and other similar vegetation."* (Emphasis added).

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[25] See clauses 2.8(1) and 2.9(1) of the local laws.

11.19 'Local fire rules' was not defined, which in the Committee's opinion may cause confusion and uncertainty. The Committee notes that clause 2.14(3) is also a new provision.

11.20 The Committee sought a written undertaking from the two Shires to:

- amend the minor typographical errors;
- amend clause 2.8(2)(d) by either listing the required specifications for the construction and location of the enclosures for containers or prescribing the required specifications for the enclosures by reference to clause 2.9(3), as if the enclosures were 'suitable enclosures';
- amend clause 2.9(3)(a) by expressly stating the minimum floor area that a 'suitable enclosure' must have;
- amend clause 2.9(3)(d)(ii) by either adopting, by reference, the relevant standard with which the liquid refuse disposal system must comply or listing the required specifications for the system;
- amend clause 2.14(2)(d) by listing the required specifications for an incinerator; and
- with respect to the *Shire of Broomehill-Tambellup Waste Services Local Law 2009*, insert a definition of "local fire rules" in clause 2.14(3).

11.21 The Committee was pleased to receive the written undertakings, as requested, from both Shires within two weeks of requesting such undertakings. As yet, neither Shire has implemented its undertakings.

12 HEALTH LOCAL LAWS 2009

12.1 In its Report No. 26, *Issues Arising Under Health Local Laws*[26] the Committee raised two areas of concern in relation to clauses in health local laws.

12.2 The first area of concern was the imposition of criminal liability on an employee for the duties of an occupier.

12.3 The second area of concern 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.

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

12.4 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.

12.5 On 21 April 2008 the former Minister for Health responded to the Report accepting the Committee's conclusions and recommendations and undertaking to effect the necessary amendments.

12.6 The Committee was pleased to note that the publication of the Health Local Laws 2009 in the *Government Gazette* on 6 October 2009 fulfilled the undertakings previously provided to the Committee.

13 UNAUTHORISED DISCLOSURE OF CONFIDENTIAL COMMITTEE CORRESPONDENCE

13.1 On 26 November 2009 the Committee published an information report concerning Unauthorised Disclosure of Confidential Committee Correspondence by the City of Joondalup.

13.2 The unauthorised disclosure gave rise to a resolution by the Committee to table an information report on this matter to ensure local governments were aware of their obligations in relation to confidential correspondence.

13.3 In its report the Committee noted that the unauthorised disclosure of confidential Committee correspondence is an interference with the conduct of the Committee's proceedings and impacts on the privileges of the Parliament.

13.4 The Committee wishes to ensure that in circumstances where it requires correspondence to be treated confidentially, local governments recognise the context and gravity of the requirement and act accordingly.

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 22 April 2010