



THIRTY-EIGHTH PARLIAMENT

REPORT 43
**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**
*SHIRE OF KOORDA CEMETERIES AMENDMENT
LOCAL LAW 2010*

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

November 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)	Hon Jim Chown MLC
Hon Robin Chapple MLC (Deputy Chairman)	Mr Paul Miles MLA
Hon Alyssa Hayden MLC	Hon Helen Bullock MLC
Ms Janine Freeman MLA	Mr Andrew Waddell MLA

Staff as at the time of this inquiry:

Irina Lobeto-Ortega, Advisory Officer (Legal)	David Driscoll, Committee Clerk
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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

CONTENTS

GOVERNMENT RESPONSE.....	I
REPORT.....	1
1 INTRODUCTION	1
2 REFERENCE AND PROCEDURE	1
3 SCRUTINY OF THE LOCAL LAW	2
4 SECTION 19(2) OF THE <i>CEMETERIES ACT 1986</i>	4
5 THE COMMITTEE'S CONCLUSIONS	5
Term of Reference 3.6(a)	5
6 RECOMMENDATIONS	5
APPENDIX 1 LETTER FROM THE MINISTER FOR LOCAL GOVERNMENT DATED 10 JUNE 2010	9

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

SHIRE OF KOORDA CEMETERIES AMENDMENT LOCAL LAW 2010

1 INTRODUCTION

- 1.1 The Committee has identified that in an amendment to its cemeteries local law, the Shire of Koorda has referred to a right of review for monumental masons under the *Cemeteries Act 1986* that only applies to funeral directors, consequently making that clause of the local law (clause 6) unauthorised.
- 1.2 This report recommends that the House disallow clause 6 of the *Shire of Koorda Cemeteries Amendment Local Law 2010*.

2 REFERENCE AND PROCEDURE

- 2.1 The instrument of subsidiary legislation which is the subject of this report, the *Shire of Koorda Cemeteries Amendment Local Law 2010 (Local Law)* falls within the definition of ‘instrument’ in the Terms of Reference of the Joint Standing Committee on Delegated Legislation (**Committee**). The Shire of Koorda (**Shire**) resolved to amend the *Shire of Koorda Cemeteries Local Law (Principal Local Law)* on 19 May 2010 and this Local Law was published in the *Western Australian Government Gazette (Gazette)* on 10 August 2010. The Local Law stood referred to the Committee upon gazettal and the full text of the Local Law is publicly available from the State Law Publisher’s website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.
- 2.2 The Committee raised concerns with the Shire in relation to clause 6 of the Local Law and sought an undertaking from the Shire to delete this clause. The Shire did not provide this undertaking to the Committee.
- 2.3 The Local Law contains two minor amendments to the Principal Local Law as well as a significant change to clause 7.18(3), which deals with cancellations of a monumental mason’s licence. Clause 7.18(3), as amended by clause 6 of the Local Law, purports to confer jurisdiction on the State Administrative Tribunal for a review of a decision to terminate a monumental mason’s licence under the *Cemeteries Act 1986*.
- 2.4 The Committee has formed the view that clause 6 of the Local Law is not authorised by the *Local Government Act 1995* nor the *Cemeteries Act 1986*. As such, the Local Law offends the Committee’s Term of Reference 3.6(a), which states that:

In its consideration of an instrument, the Committee is to enquire whether the instrument ... is authorized or contemplated by the empowering enactment.

2.5 In this case, the Local Law is made under the powers contained in Part VIII of the *Cemeteries Act 1986*, which deals with local laws, as well as Part 3 Division 2, Subdivision 2 of the *Local Government Act 1995*.

2.6 Section 55 of the *Cemeteries Act 1986* provides, among other things, that:

A Board [in this case, the Shire] may make local laws or by-laws, as the case may be, that are necessary or convenient for the purposes of this Act and in particular for any of the following purposes -

...

(m) prescribing the procedures of a Board with respect to applications for and issues of licences, permits and permissions.

2.7 Further, section 54(1) of the *Cemeteries Act 1986* makes it clear that any local laws made by a Board must comply with the procedures set out in sections 3.11 to 3.17 of the *Local Government Act 1995*, which are contained in Subdivision 2, Division 2 of Part 3 of that Act:

A Board that is a local government may make local laws in accordance with subdivision 2 of Division 2 of Part 3 of the Local Government Act 1995 for the purposes specified in section 55.

2.8 Clause 1.2 of the Principal Local Law clarifies that, for the purposes of the Local Law, 'Board' means the Shire.

3 SCRUTINY OF THE LOCAL LAW

3.1 The Committee first considered the Local Law at its meeting on 20 September 2010 and wrote to the Shire expressing its concerns with the amendment to clause 7.18(3) of the Principal Local Law on 21 September 2010.

3.2 The Committee identified that the amendment to clause 7.18(3) of the Principal Local Law was made because it referred to section 19(3) of the *Cemeteries Act 1986*, which was repealed in 2004 by section 102 of the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004*. Section 19(3) of the *Cemeteries Act 1986* stipulated that an appeal under that section may be instituted by the appellant specifying the grounds of appeal with the clerk of the Local Court within one month of the Board notifying the appellant of the Board's decision.

- 3.3 In its letter to the Shire the Committee noted that, following the repeal of section 19(3) in 2004, the *Cemeteries Act 1986* was not amended to provide for any persons other than funeral directors whose permit was terminated under a cemeteries local law to apply to the State Administrative Tribunal for review.
- 3.4 The Committee advised the Shire that it had raised this issue with the Minister for Local Government, who agreed with the Committee's view, but proposed to take no action to amend this deficiency in the *Cemeteries Act 1986*. The Minister's letter is attached to this report as **Appendix 1**.
- 3.5 Clause 7.18(3) of the Principal Local Law currently provides that a monumental mason may apply to the State Administrative Tribunal under section 19(2) of the *Cemeteries Act 1986* for a review of the decision to cancel a monumental mason's licence. However, section 19(2) of the *Cemeteries Act 1986* only gives funeral directors a right of review through the State Administrative Tribunal when their licence is refused, cancelled or suspended by the Board. This issue is discussed in more detail under heading three in this report: 'Section 19(2) of the *Cemeteries Act 1986*'.
- 3.6 The Committee therefore sought an undertaking from the Shire that clause 7.18(3) be deleted from the Principal Local Law within six months, as it was not authorised or contemplated by the *Cemeteries Act 1986*. The Shire responded on 29 September 2010 outlining its view that clause 7.18(3) of the Principal Local Law did effectively give a right of review for monumental masons based on section 19(2) of the *Cemeteries Act 1986* and therefore the clause did not conflict with any other legislation.
- 3.7 The Committee again wrote to the Shire on 18 October 2010 to reiterate its view that clause 7.18(3) of the Principal Local Law was not authorised by the *Cemeteries Act 1986* and continued to seek an undertaking that the clause be deleted within six months.
- 3.8 In the final response from the Shire of 25 October 2010, the Shire did not provide the requested undertaking to delete the clause, instead preferring to give a commitment to:

advise all applicants for monumental mason license [sic] of their appeal rights under the Local Government Act 1995, and would further amend the Local Law on the next occasion that the Cemeteries Local Law is reviewed, and that this will be done within a two year period, as they [the Shire Council] consider the relevant clause unlikely to be enforced.¹

¹ Letter from Cr Janet Brooks, Shire President, Shire of Koorda, 25 October 2010, p1.

3.9 The Committee does not consider this commitment to be sufficient, as it means that clause 7.18(3) remains in the Principal Local Law and may be relied upon by members of the public when seeking review of an administrative decision. It does not sit comfortably with the Committee to permit an unauthorised local law to remain in the public domain.

4 SECTION 19(2) OF THE CEMETERIES ACT 1986

4.1 Clause 7.18(3) of the Principal Local Law, as amended by clause 6 of the Local Law, states that:

An aggrieved person whose licence has been terminated [by the Board] under subclause (1) may apply to the State Administrative Tribunal for a review of the decision of the Board in accordance with section 19(2) of the Act [the Cemeteries Act 1986].

4.2 Section 19(2) of the *Cemeteries Act 1986* is located within Part IV, Division 3 of that Act, entitled ‘*Licensing of funeral directors*’. Section 19 deals with applications for the review of decisions of the Board which aggrieve funeral directors:

(1) Where a Board —

(a) refuses an application for a licence²; or

(b) cancels or suspends a licence,

the Board shall notify in writing the applicant or the person to whom the licence was issued of its decision and of the reasons for that decision.

(2) An aggrieved applicant or person whose licence has been cancelled or suspended may apply to the State Administrative Tribunal for a review of the decision of the Board.

4.3 Clause 7.18(3) of the Principal Local Law, as amended by clause 6 of the Local Law, refers to section 19(2) of the *Cemeteries Act 1986* above, in relation to the right of a monumental mason to apply for review. Notwithstanding the broad wording of that provision, the Committee is satisfied that the intent of section 19(2) is to provide only funeral directors with a right of review to the State Administrative Tribunal.

4.4 Clause 7.18(3) of the Principal Local Law, which refers to this provision in relation to monumental masons, is therefore beyond what is authorised or contemplated by the *Cemeteries Act 1986*.

² “In this Act, unless the contrary intention appears, **licence** means a funeral director’s licence issued or deemed to have been issued under Part IV”: section 3(1) of the *Cemeteries Act 1986*.”

5 THE COMMITTEE'S CONCLUSIONS

Term of Reference 3.6(a)

- 5.1 The Committee has concluded that the *Shire of Koorda Cemeteries Amendment Local Law 2010* offends its Term of Reference 3.6(a) on the basis that clause 6 of the Local Law goes beyond what is authorised or contemplated by the *Cemeteries Act 1986*.
- 5.2 The Committee has resolved to recommend that the House disallow clause 6 of the Local Law on this basis.
- 5.3 The Committee also notes that numerous cemeteries local laws which are currently in force contain either this incorrect reference to section 19(2) or a reference to the repealed section 19(3) of the *Cemeteries Act 1986*, which is also incorrect. The Governor has the power to make local laws to amend the text of, or repeal, local laws under section 3.17 of the *Local Government Act 1995*:

3.17. Governor may amend or repeal local laws

(1) The Governor may make local laws to amend the text of, or repeal, a local law.

(2) Subsection (1) does not include the power to amend a local law to include in it any provision that bears no reasonable relationship to the local law as in force before the amendment.

(3) The Minister is to give a local government notice in writing of any local law that the Governor makes to amend the text of, or repeal, any of the local government's local laws.

(4) Section 5.94 applies as if a local law made under this section by the Governor were a local law made by the local government in accordance with section 3.12.

- 5.4 The Committee is of the view that, as numerous local government cemeteries local laws currently contain an incorrect reference to a right of review for monumental masons under the *Cemeteries Act 1986*, it would be an appropriate exercise of the Governor's power under this section to correct the error for all local governments.

6 RECOMMENDATIONS

Recommendation 1: The Committee recommends that clause 6 of the *Shire of Koorda Cemeteries Amendment Local Law 2010* be disallowed.

Recommendation 2: The Committee recommends that the Governor, on the advice of the Minister for Local Government, invoke section 3.17 of the *Local Government Act 1995* to effect an amendment to delete, from all local government cemeteries local laws, any clauses with the following wording:

“(3) An aggrieved person whose licence has been terminated under subclause (1) may apply to the State Administrative Tribunal for a review of the decision of the Board in accordance with section 19(2) of the Act.”

and

“(3) An aggrieved person whose licence has been terminated under subclause (1) may appeal to a Local Court against a decision of the Board under this clause in the manner stated in section 19(3) of the Act.”



**Mr Joe Francis MLA
Chairman**

25 November 2010

APPENDIX 1
LETTER FROM THE MINISTER FOR LOCAL
GOVERNMENT DATED 10 JUNE 2010

- 2 -

complaints made arising from such decisions by the Board and the need for such comprehensive appeal coverage may not be justified.

Due to the Government's legislative priorities, the proposed amendments to the Act are not likely to be developed into a Cabinet Submission seeking approval to draft. In its place, I have recently requested that the Department of Local Government assess the proposals previously developed and determine whether an alternative to amending the Act could be sufficient to deal with the various issues identified. This will include consideration of whether the avenues currently available to an aggrieved party to object, such as putting their complaint to the Board, the Minister for Local Government or the Ombudsman, are viable alternatives.

Thank you for bringing your concerns to my attention and I trust that the above information has been useful.

Yours sincerely



G M (John) Castrilli MLA
**MINISTER FOR LOCAL GOVERNMENT; HERITAGE;
CITIZENSHIP AND MULTICULTURAL INTERESTS**

10 JUN 2010