41ST PARLIAMENT

Report 1

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

City of Kalamunda Dogs Local Law 2021

Presented by

Mr Geoff Baker MLA (Chair)

and

Hon Lorna Harper MLC (Deputy Chair)

September 2021

Joint Standing Committee on Delegated Legislation

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EXECUTIVE SUMMARY

1 The Joint Standing Committee on Delegated Legislation (Committee) has concluded that the City of Kalamunda (City) did not follow the correct procedure when it made the *City of Kalamunda Dogs Local Law 2021* (Local Law). The Committee has recommended that the Local Law be disallowed.

2 In making a local law, a local government is to follow the procedure set out in section 3.12 of the *Local Government Act 1995* (LGA) which includes a requirement to give local public notice of the proposed local law and invite submissions.

3 The LGA provides that the local government, after considering any submissions received, may make a local law that is not significantly different from the proposed local law. If the local government decides to make a local law that is significantly different from the proposed local law, it is to recommence the law making procedure.

4 The Local Law is invalid because it is significantly different from the proposed local law and the City did not recommence the law making procedure. Whilst the proposed local law, of which local public notice was given, permitted four dogs to be kept on certain premises, the adopted local law only permitted two dogs to be kept.

5 The Local Law is invalid and offends the Committee's term of reference (a) in that it is not authorised by the empowering enactment.

Recommendation

The recommendation appears in the text at the page number indicated:

RECOMMENDATION 1	Page 5
The *City of Kalamunda Dogs Local Law 2021* be disallowed.	

1 Reference and procedure

1.1 On 16 April 2021 the *City of Kalamunda Dogs Local Law 2021* (Local Law) was published in the Government *Gazette*.

1.2 Upon gazettal, the Local Law stood referred to the Joint Standing Committee on Delegated Legislation (Committee).[1]

2 Statutory procedure for making a local law

2.1 The power to make the Local Law was derived from section 3.5(1) of the *Local Government Act 1995* (LGA) and section 26 of the *Dog Act 1976*. Section 3.5(1) of the LGA states:

> A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions[2] under this Act.

2.2 Section 26 of the *Dog Act 1976* is at Appendix 1.

2.3 Part 3, Division 2, Subdivision 2 of the LGA sets out the procedure that a local government is to follow when making a local law. In the case of the Local Law, sections 3.12(4) and 3.13 are most relevant. Sections 3.12 and 3.13 of the LGA are at Appendix 2.

2.4 Importantly, section 3.12(4) requires that, after local public notice of a proposed local law has been given and after the last day for submissions, the local government:

> is to consider any submissions made and may make the local law* as proposed or make a local law* that is not significantly different from what was proposed. (underlining added)

*Absolute majority required.

2.5 Section 3.13 states:

> **Procedure where significant change in proposal**
>
> If during the procedure for making a proposed local law the local government decides to make a local law that would be significantly different from what it first proposed, the local government is to recommence the procedure. (underlining added)

2.6 In order to assist local governments to pass valid local laws, the Department of Local Government, Sport and Cultural Industries has, for many years, published a Statutory Procedures Checklist which outlines the mandatory procedural steps prescribed by section 3.12 of the LGA, and other sections, to pass a valid local law. Part C of the checklist clearly indicates the requirements of section 3.12(4) of the LGA.[3]

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1 Committee Term of Reference 10.5: *Standing Orders of the Legislative Council* Schedule 1, clause 10.5.

2 The general function of a local government is 'to provide for the good governance of persons in its district': s 3.1 *Local Government Act 1995*.

3 Government of Western Australia, 19 September 2019, see: Premier's Circular 2014/01. Viewed 26 August 2021.

3 The procedure for making the Local Law

3.1 The Local Law was proposed by the City of Kalamunda (City) at an Ordinary Council Meeting on 23 June 2020 (Proposed Local Law). The stated purpose of the Proposed Local Law is to:

> make provisions about the impounding of dogs, to control the number of dogs that can be kept on premises and the manner of keeping those dogs and to prescribe areas in which dogs are prohibited and dog exercise areas.[4]

3.2 The Proposed Local Law included clause 3.2, which prescribed the number of dogs which may be kept on premises:

> **3.2 Limitation on the number of dogs**
>
> (1) This clause does not apply to premises which have been—
>
> a) licensed under Part 4 of this local law as an approved kennel establishment; or
>
> b) granted an exemption under section 26(3) of the Act.
>
> (2) The limit on the number of dogs which may be kept on any premises is, for the purpose of section 26(4)[5] of the Act—
>
> a) two dogs over the age of three months and the young of those dogs under that age if the premises are zoned other than as rural, rural residential or urban under a local planning scheme; or
>
> b) four dogs over the age of three months and the young of those dogs under that age if the premises are zoned as rural, rural residential or urban under a local planning scheme.

3.3 The Proposed Local Law was then advertised for public comment pursuant to section 3.12(3) of the LGA[6].

3.4 The Proposed Local Law was adopted by the Council on 15 December 2020. On review of the public submissions, the Council adopted an amendment to the Proposed Local Law. The amendment was made at its meeting on 23 February 2021 and changed the number of dogs which may be kept on premises. The new clause 3.2 is:

> **3.2 Limitation on the number of dogs**
>
> (1) This clause does not apply to premises which have been—
>
> a) licensed under Part 4 of this local law as an approved kennel establishment; or
>
> b) granted an exemption under section 26(3) of the Act.
>
> (2) The limit on the number of dogs which may be kept on any premises is, for the purpose of section 26(3) of the Act— 2 dogs over the age of 3 months and the young of those dogs under that age.

3.5 In summary, the Proposed Local Law permitted four dogs to be kept on certain premises. The adopted Local Law only permitted two dogs to be kept on any premises.

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4 City of Kalamunda Dog Local Law 2021, *Explanatory Memorandum*, p 1.

5 This is a typographical error. The correct section is 26(3) of the *Dog Act 1976*.

6 The proposed Local Law was advertised in the *Echo* newspaper and on notice boards at the City's offices and every library.

4 Instrument is 'significantly different' from what was proposed

4.1 The Committee is of the view that the Local Law is 'significantly different' from the Proposed Local Law.

4.2 The phrase 'significantly different' is not defined in the LGA.

4.3 Edleman J in a 2017 High Court judgment stated:

> ...where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense.[7]

4.4 The Macquarie Dictionary defines 'significant' to mean 'important; of consequence'[8] and 'different' to mean 'differing in character; having unlike qualities; dissimilar'.[9]

4.5 There is limited legislative guidance on the meaning of the phrase 'significantly different'.

4.6 In *Clark v Cook Shire Council* [2008] 1 Qd R 327, the Queensland Court of Appeal considered the meaning of 'significantly different'.[10] The Court unanimously approved of a 'macrocosm' view of the legal test for 'significantly different', finding that the modifications to a proposed planning scheme must have the consequence that the modified scheme as a whole is significantly different from the proposed scheme as notified.[11] (underlining added)

4.7 Keane JA expressed his opinion that in the context of the phrase 'significant difference' in that case, 'significance' is concerned with 'whether the modifications are such as to have the consequence that the modified scheme as a whole is materially different from the notified scheme'.[12]

4.8 There are only a few factual examples of when previous committees have found a proposed local law to be 'significantly different' from the local law that was made.

4.9 In the 40th Parliament, the previous committee found a significant difference in a local law which lowered the thickness threshold for reusable plastic bags from 60 microns to 35 microns.[13]

4.10 The previous committee in the 38th Parliament recommended the disallowance of the *City of Nedlands Parking and Parking Facilities Local Law 2012* on the basis that the final local law was significantly different from the proposed local law.[14] In that case, a clause was

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7 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at para 94.

8 *Macquarie Dictionary*, 2021, Macquarie Dictionary Publishers 2021. See: https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=significant Viewed 25 August 2021.

9 Ibid. See: https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=different Viewed 25 August 2021.

10 This case involved an amendment to the zoning of land in a planning scheme. The relevant legislation in this case is analogous to sections 3.12(4) and 3.13 of the LGA. The Queensland Act provided that, if a local government decides to proceed with a proposed planning scheme with modifications, and is satisfied that the modifications will make the proposed planning scheme 'significantly different' from the proposed planning scheme as notified, it must recommence the notification process.

11 *Clark v Cook Shire Council* [2008] 1 Qd R 327, para 5.

12 Ibid., para 29.

13 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 6, *Town of East Fremantle Plastic Bag Reduction Local Law 2017*, November 2017.

14 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 62 *City of Nedlands Parking and Parking Facilities Local Law 2012*, November 2012.

inserted after local public notice had been given which prevented the owner or occupier of premises adjacent to a verge charging a fee for parking on the verge. This clause was not in the proposed local law.

4.11 In 2004, a previous committee found that a local law which prescribed prickly lettuce as a pest plant was significantly different from the proposed local law which did not prescribe prickly lettuce as a pest plant. In that case, the committee acknowledged that although the difference was minor in form, the law was significantly different because the main purpose of the local law was to prescribe pest plants for the district. The insertion prescribed a new pest plant in the local law which had not been advertised.[15]

4.12 A previous committee has observed that in determining if a law made is significantly different from a proposed law, each case turns on its own facts.[16]

The Local Law

4.13 The Committee concludes, on the ordinary meaning of the word 'significant', that halving the number of dogs that can be kept on certain premises is a significant change.

4.14 Further, the Committee is of the view that the number of dogs that can be kept on certain premises in the City of Kalamunda is a material aspect of the Local Law. The change from four dogs on certain premises to two changes the Local Law as a whole.

4.15 The modification to the Proposed Local Law after the consultation period had closed meant that the public was not consulted about the reduction from four dogs to two on premises zoned rural, rural residential or urban. Members of the public would have assessed the Proposed Local Law and based their submissions on a four dog limit for those premises. There was no opportunity to consider the reduced limit prior to the adoption of the Local Law.

4.16 The Committee's view is that this is contrary to one of the intents of sections 3.12 and 3.13 of the LGA, which is to:

> ensure that local governments engage in community consultation prior to making a local law. This consultation process is particularly important when new laws are being proposed or inserted into a local law.[17]

4.17 The consultation process required by the LGA is rendered meaningless if the proposed local law is then adopted with significant changes.

5 Can section 3.12(2A) of the *Local Government Act 1995* save the instrument from invalidity?

5.1 Section 3.12(2A) of the LGA provides that:

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

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15 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, August 2004.

16 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 62 *City of Nedlands Parking and Parking Facilities Local Law 2012*, November 2012, p 6.

17 Ibid.

5.2 The Committee is of the view that in failing to recommence the procedure for making the Local Law, it is invalid by reason of non-compliance with sections 3.12(4) and 3.13 of the LGA.

5.3 It is not possible to comply substantially with the local law-making procedure if the requirements of section 3.12(4) are not satisfied; it is a vital step in the process.

5.4 The Committee's opinion is that section 3.12(2A) cannot be relied upon to save the Local Law from invalidity due to that non-compliance.

6 Conclusion

6.1 The Local Law offends the Committee's term of reference (a) in that it is not authorised by the empowering enactment on the basis of non-compliance with mandatory requirements in the LGA.

6.2 The Committee's Term of Reference 10.6(a) states:

> In its consideration of an instrument, the Committee is to inquire whether the instrument—(a) is within power.

6.3 The Local Law is significantly different from the Proposed Local Law advertised for public consultation.

6.4 The Local Law is therefore invalid due to:

- non-compliance with sections 3.12(4) and 3.13 of the LGA
- the City's failure to recommence the law making procedure in section 3.12 of the LGA after making a law that is significantly different from the proposed local law.

6.5 There are a number of benefits to recommending the disallowance of invalid instruments, including ensuring that invalid laws are quickly removed from the public record and reducing the risk of public misinformation.

7 Recommendation

7.1 The Committee makes the following recommendation.

RECOMMENDATION 1

The *City of Kalamunda Dogs Local Law 2021* be disallowed.

Mr Geoff Baker MLA
Chair

APPENDIX 1

DOG ACT 1976

Part V — The keeping of dogs

26. Limitation as to numbers

(1) A local government may, by a local law under this Act —

(a) limit the number of dogs that have reached 3 months of age that can be kept in or at premises in the local government's district; or

(b) limit the number of dogs of a breed specified in the local law that can be kept in or at premises in the local government's district.

(2) A local law mentioned in subsection (1) —

(a) may limit the number of dogs that can be kept in or at premises to 2, 3, 4, 5 or 6 only; and

(b) cannot prevent the keeping in or at premises of one or 2 dogs that have reached 3 months of age and any pup of either of those dogs under that age; and

(c) cannot apply to dogs kept at premises that are licensed under section 27 as an approved kennel establishment; and

(d) cannot apply to dangerous dogs (declared) or dangerous dogs (restricted breed).

(3) Where by a local law under this Act a local government has placed a limit on the keeping of dogs in any specified area but the local government is satisfied in relation to any particular premises that the provisions of this Act relating to approved kennel establishments need not be applied in the circumstances, the local government may grant an exemption in respect of those premises but any such exemption —

(a) may be made subject to conditions, including a condition that it applies only to the dogs specified in the exemption; and

Dog Act 1976
Part V The keeping of dogs

s. 26

(b) cannot authorise the keeping in or at those premises of —

(i) more than 6 dogs that have reached 3 months of age; or

(ii) a dog under that age unless it is a pup of a dog whose keeping is authorised by the exemption;

and

(c) may be revoked or varied at any time.

(4) A person must not keep in or at any premises, not being licensed under section 27 as an approved kennel establishment —

(a) in the case of dogs that have reached 3 months of age, other than dangerous dogs (declared) or dangerous dogs (restricted breed), more than the number of dogs than the limit imposed under —

(i) a local law mentioned in subsection (1); or

(ii) an exemption granted under subsection (3);

or

(b) more than —

(i) 2 dangerous dogs (declared); or

(ii) 2 dangerous dogs (restricted breed); or

(iii) one of each of those kinds of dangerous dogs,

that have reached 3 months of age; or

(c) any pup, of a dangerous dog (restricted breed), that is under 3 months of age.

Penalty:

(a) for an offence relating to a dangerous dog —

(i) a fine of $10 000, but the minimum penalty is a fine of $500;

(ii) for each separate and further offence committed by the person under the

Interpretation Act 1984 section 71, a fine of $500;

(b) for an offence relating to a dog other than a dangerous dog —

(i) a fine of $5 000;

(ii) for each separate and further offence committed by the person under the *Interpretation Act 1984* section 71, a fine of $100.

(5) Any person who is aggrieved —

(a) by the conditions imposed in relation to any exemption under subsection (3); or

(b) by the refusal of a local government to grant such an exemption, or by the revocation of an exemption,

may apply to the State Administrative Tribunal for a review of the decision.

(6) An application under subsection (5) cannot be made later than the expiry of a period of 28 days after the day on which a notice of the decision is served on the person affected by that decision.

[Section 26 amended: No. 23 of 1987 s. 22; No. 14 of 1996 s. 4; No. 24 of 1996 s. 16; No. 55 of 2004 s. 256 and 268; No. 18 of 2013 s. 22.]

27. Licensing of approved kennel establishments

(1) Where, under section 26(1)(a) or (b), a limit is imposed on the number of dogs that can be kept in or at any premises situate in a local government's district area, and a person proposes to keep more than that number of dogs in or at premises in that area that are not exempt from the limitation, the person must apply for the premises in question to be licensed as an approved kennel establishment.

APPENDIX 2

LOCAL GOVERNMENT ACT 1995

Subdivision 2 — Local laws made under any Act

3.11. Subdivision applies to local laws made under any Act

This Subdivision applies to local laws made under this Act and the procedure for making them and, unless a contrary intention appears in that other Act, to local laws made under any other Act, and the procedure for making them.

3.12. Procedure for making local laws

(1) In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.

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

(2) At a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner.

(3) The local government is to —

(a) give local public notice stating that —

(i) the local government proposes to make a local law the purpose and effect of which is summarized in the notice; and

(ii) a copy of the proposed local law may be inspected or obtained at any place specified in the notice; and

(iii) submissions about the proposed local law may be made to the local government before a day to be specified in the notice, being a day that is not less than 6 weeks after the notice is given;

and

(b) as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister; and

(c) provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.

[(3a) deleted]

(4) After the last day for submissions, the local government is to consider any submissions made and may make the local law* as proposed or make a local law* that is not significantly different from what was proposed.

* *Absolute majority required.*

(5) After making the local law, the local government is to publish it in the *Gazette* and give a copy of it to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.

(6) After the local law has been published in the *Gazette* the local government is to give local public notice —

(a) stating the title of the local law; and

(b) summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and

(c) advising that the local law is published on the local government's official website and that copies of the local law may be inspected at or obtained from the local government's office.

(7) The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.

(8) In this section —

making in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.

[Section 3.12 amended: No. 1 of 1998 s. 8; No. 64 of 1998 s. 6; No. 49 of 2004 s. 16(4) and 23; No. 26 of 2016 s. 5; No. 16 of 2019 s. 8.]

3.13. Procedure where significant change in proposal

If during the procedure for making a proposed local law the local government decides to make a local law that would be significantly different from what it first proposed, the local government is to recommence the procedure.

3.14. Commencement of local laws

(1) Unless it is made under section 3.17, a local law comes into operation on the 14th day after the day on which it is published in the *Gazette* or on such later day as may be specified in the local law.

(2) A local law made under section 3.17 comes into operation on the day on which it is published in the *Gazette* or on such later day as may be specified in the local law.

[Section 3.14 amended: No. 1 of 1998 s. 9.]

3.15. Local laws to be publicised

A local government is to take reasonable steps to ensure that the inhabitants of the district are informed of the purpose and effect of all of its local laws.

3.16. Periodic review of local laws

(1) Within a period of 8 years from the day when a local law commenced or a report of a review of the local law was accepted under this section, as the case requires, a local government is to carry out a review of the local law to

GLOSSARY

Term	Definition
City	City of Kalamunda
Committee	Joint Standing Committee on Delegated Legislation
LGA	*Local Government Act 1995*
Local Law	*City of Kalamunda Dogs Local Law 2021*
Proposed Local Law	City of Kalamunda Dogs Local Law 2020 proposed by the City of Kalamunda at an Ordinary Council Meeting on 23 June 2020

Joint Standing Committee on Delegated Legislation

Date first appointed:

25 May 2021

Terms of Reference:

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

'10. Joint Standing Committee on Delegated Legislation

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

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

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

10.4 (a) A report of the Committee is to be presented to each House by a member of each House appointed for the purpose by the Committee.

(b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.

10.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

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

(a) is within power;

(b) has no unintended effect on any person's existing rights or interests;

(c) provides an effective mechanism for the review of administrative decisions; and

(d) contains only matter that is appropriate for subsidiary legislation.

10.7 It is also a function of the Committee to inquire into and report on -

(a) any proposed or existing template, *pro forma* or model local law;

(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and

(c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.

10.8 The Standing Orders of the Legislative Council relating to Standing Committees will be followed as far as they can be applied.

10.9 In this order-

"instrument" means -

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*.**'**

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