

41ST PARLIAMENT



Report 2

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Annual Report 2021

Presented by

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and

Hon Lorna Harper MLC (Deputy Chair)

June 2022

Joint Standing Committee on Delegated Legislation

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EXECUTIVE SUMMARY

Introduction

- 1 This report summarises the key activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January 2021 and 31 December 2021 (Reporting Period).
- 2 The Committee's role is to scrutinise, on behalf of the Parliament, instruments made under statutory delegation by:
 - the Governor in Executive Council
 - Ministers
 - statutory bodies
 - local governments.
- 3 The Committee determines whether the instruments are within power of the authorising primary legislation or are otherwise in breach of the Committee's terms of reference.¹

Committee activities

Scrutiny of delegated legislation

- 4 The Committee scrutinised a significant volume of delegated legislation.
- 5 In the Reporting Period, the Committee considered 369 instruments, including 180 regulations and 118 local laws.
- 6 Motions for the disallowance of delegated legislation usually do not proceed in the Parliament if the Committee receives satisfactory undertakings to amend the instrument. The Committee only recommends the disallowance of an instrument as a last resort. During the Reporting Period, the Committee received departmental (Ministerial) undertakings covering seven instruments and local government undertakings covering 33 local laws.
- 7 The Committee tabled one report in the Parliament recommending the disallowance of the *City of Kalamunda Dogs Local Law 2021*. The Legislative Council disallowed this local law.

Other activities

- 8 The Committee also worked with the Department of Premier and Cabinet in updating Premier's Circular 2014/01 (now 2021/07).

Issues relating to regulations

- 9 A Code of Practice² contained a definition which the Committee considered was inconsistent with the authorising legislation under its term of reference 10.6(a) and therefore beyond power. The Minister for Health provided the Committee with an undertaking to amend the definition to ensure it was consistent with this legislation.
- 10 Otherwise, there were no significant issues in the Committee's scrutiny of regulations and other disallowable instruments. The Committee commends departments, other agencies and Parliamentary Counsel's Office on the quality of drafting.

¹ The Committee's terms of reference appear on the back inside cover of this report.

² The authorising legislation provides that this code is disallowable as if it were a regulation.

Issues relating to local laws

- 11 The Committee requested and obtained undertakings from local governments to amend their local laws to address specific issues the Committee identified.
- 12 Six of the undertakings obtained facilitated amendments to ensure the local laws were within power of the *Local Government Act 1995*.
- 13 The Committee also requested and obtained a number of undertakings to correct drafting errors.

1 Introduction

Overview

- 1.1 This report:
- outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January 2021 and 31 December 2021 (Reporting Period)³
 - discusses some of the more notable instruments considered by the Committee
 - comments on significant issues arising from the Committee's scrutiny of delegated legislation.
- 1.2 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider instruments of delegated legislation published in the *Government Gazette*.⁴ Like its predecessors, the Committee in this 41st Parliament considers only:
- instruments that are subject to parliamentary disallowance⁵
 - instruments noted by an individual Member.
- 1.3 The majority of the instruments considered are regulations made by the Executive Government via the Governor in Executive Council. Other instruments include local laws made by local governments, court rules, by-laws, planning schemes, orders, notices, plans and other variously-named instruments made by a range of persons or bodies.

Terms of reference

- 1.4 The Committee's terms of reference (TOR) are listed on the back inside cover of this report. They were adopted by the Parliament on 25 May 2021, when the Committee was established.⁶
- 1.5 The Committee operates under the *Standing Orders of the Legislative Council*.⁷
- 1.6 The Committee considers whether an instrument complies with or offends any of the requirements set out in item 10.6 of its TOR, including whether the instrument is 'within power' or 'contains only matter that is appropriate for subsidiary legislation'.

Committee members

- 1.7 In the Reporting Period the Committee was constituted by the Members on the inside cover of this report.

³ The first meeting of the Committee in the 41st Parliament was on 2 June 2021.

⁴ Either under section 41(1)(a) of the *Interpretation Act 1984* or another written law: Term of Reference 10.5: *Standing Orders of the Legislative Council*, schedule 1, cl 10.5.

⁵ Pursuant to section 42 of the *Interpretation Act 1984* or another written law.

⁶ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 May 2021, pp 670-1.

⁷ The Parliament amended the Terms of Reference by adding a new cl 10.8, which states:

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

Figure 1. *Committee members in 2021*



Left to right: Dr Katrina Stratton MLA; Mr Stuart Aubrey MLA; Hon Lorna Harper MLC (Deputy Chair); Hon Stephen Pratt MLC; Mr Geoff Baker MLA (Chair); Hon James Hayward MLC; Hon Martin Pritchard MLC; Ms Christine Tonkin MLA.

Committee process

- 1.8 When the Committee has questions about an instrument, it writes to the relevant Minister or local government President or Mayor and requests further information to assist in its scrutiny of the instrument. In many instances, the responses received address the Committee's questions and no further action is taken.
- 1.9 When the Committee forms the view that a clause or clauses in the instrument offend its TOR, the Committee usually requests an undertaking from the responsible Minister or local government to amend the instrument.
- 1.10 The responsible Minister or local government usually undertakes to amend or repeal the delegated legislation within six months of the date of the undertaking. The Committee monitors whether delegated legislation has been amended within the agreed timeframe.
- 1.11 While the Committee awaits the response to questions or its request for undertakings on a particular instrument, it is often necessary to authorise a Committee Member to give notice of a motion to disallow the instrument in the Legislative Council.⁸ This is to:
 - protect the Parliament's right to disallow the local law should the Committee recommend disallowance
 - provide the Committee with additional time to scrutinise the local law and, if necessary, obtain further information.
- 1.12 Notice must be given within 14 sitting days after the instrument is tabled in the Parliament.⁹

⁸ The Legislative Council has procedures in place for dealing with motions for disallowance, including those motions which are instigated by the Committee: refer to *Standing Orders of the Legislative Council*, standing order 67.

⁹ *Interpretation Act 1984* s 42. Note that other Acts may provide for a different period during which Notices of Motion to disallow delegated legislation may be given.

- 1.13 The majority of these notices of motion¹⁰ are later discharged from the Legislative Council Notice Paper following receipt of satisfactory responses from Ministers and local governments.¹¹
- 1.14 When required, the Committee reports to the Parliament recommending the disallowance of all or part of an instrument.
- 1.15 The Committee only recommends the disallowance of an instrument as a last resort where agreement cannot be reached on acceptable arrangements.

Undertakings lists

- 1.16 The Committee posts two lists of undertakings on its webpage (www.parliament.wa.gov.au/del), namely:
- departmental undertakings (undertakings provided by Ministers, government departments, agencies and statutory authorities)
 - local government undertakings.
- 1.17 These lists inform stakeholders of issues the Committee has raised and assist departmental and local government officers in drafting delegated legislation. In particular, the local government undertakings list allows local governments and their advisers to identify systemic problems in local laws.

Acknowledgements

- 1.18 The Committee relies on the assistance provided by relevant Ministers, departments, statutory bodies and local governments in undertaking its function of scrutinising a large volume of delegated legislation within time constraints. The Committee extends its appreciation to those Ministers and contact persons who provided that assistance during the Reporting Period.
- 1.19 In particular, the Committee thanks:
- the Department of Local Government, Sport and Cultural Industries (DLGSC), which acts as a valuable filter in dealing with problematic proposed local laws, thus resolving many issues before the local laws are formally made, gazetted and then referred to the Committee
 - the Western Australian Local Government Association, another valued source of local laws information and expertise for local governments.

2 Committee activities in 2021

Volume and nature of work

- 2.1 The Committee held 14 meetings in the Reporting Period.
- 2.2 Table 1 provides a breakdown of the Committee's activities in respect of instruments published in the *Government Gazette* during that period.

¹⁰ Which usually become motions to disallow on the third sitting day after they have been moved: *Standing Orders of the Legislative Council*, standing order 67(3).

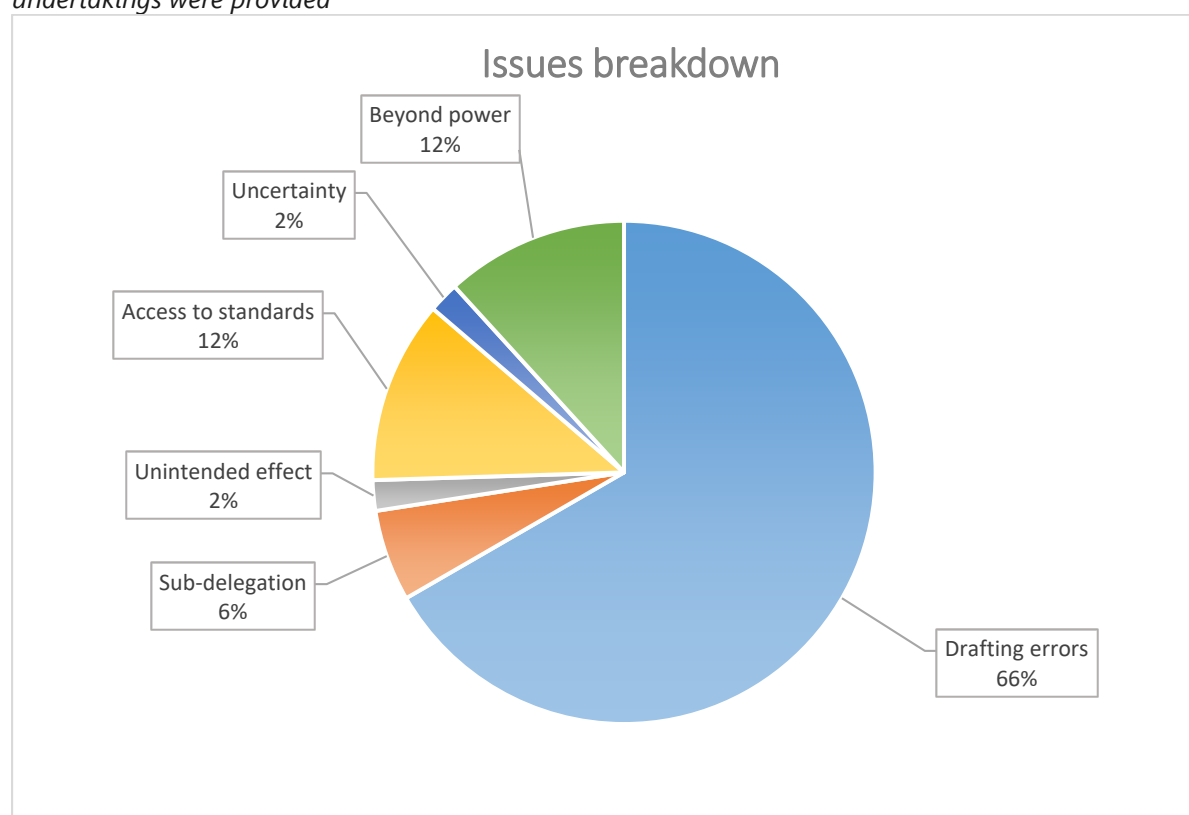
¹¹ The statistics relating to this practice are contained in Table 1 on page 4.

Table 1. *The Committee's work statistics for 2021*

Disallowable instruments published in the Government Gazette and scrutinised by the Committee	369
• Regulations	180
• By-laws (made by the Executive)	4
• Local laws (made by local government)	118
• Rules	16
• Other instruments referred (including planning schemes, orders, codes, notices and plans)	51
Notices of motion for disallowance given	44
Motions to disallow discharged	36
Hearings held by the Committee	2
Instruments for which undertakings were provided to the Committee to amend the instrument	40
Instruments for which undertakings were provided to the Committee to repeal the instrument	0
Reports tabled	1
Disallowance reports tabled	1

2.3 Figure 2 sets out information about the 40 instruments where undertakings were given to the Committee. It provides an indication of the nature, number and frequency of issues the Committee encountered. Some instruments (local laws) contained multiple issues.

Figure 2. *The nature, number and frequency of issues encountered by the Committee in 2021 where undertakings were provided*



Drafting issues

2.4 Sixty six percent of the issues encountered in 2021 related to drafting. This compares to 70 percent in 2020, 52 percent in 2019 and 56 percent in 2018.

- 2.5 The overwhelming majority of drafting issues detected by the Committee were in local laws.
- 2.6 As was the case in the 40th Parliament, many of the drafting errors could have been avoided by conducting vigorous proofreading and cross-reference checks prior to the instrument being published.
- 2.7 It is disappointing there has not been a significant improvement in the percentage of drafting issues in local laws scrutinised by the Committee, despite the previous Committee's comments in its Annual Report 2020¹² and its hope to see a reduction in drafting errors in 2021. This requires improvement and the Committee hopes this will occur during the remainder of the 41st Parliament.

Committee reports

- 2.8 In the Reporting Period, the Committee tabled Report 1: *City of Kalamunda Dogs Local Law* on 9 September 2021.¹³ This report can be viewed at www.parliament.wa.gov.au/del.

Undertakings

- 2.9 During the Reporting Period, the Committee received departmental (Ministerial) undertakings covering seven instruments and local government undertakings covering 33 local laws. The lists of undertakings can be viewed at www.parliament.wa.gov.au/del by scrolling down to 'Undertakings provided to the Committee'.

Circulars relating to explanatory memoranda

- 2.10 Premier's Circular, *Subsidiary legislation—explanatory memoranda* (Circular) directs delegated legislation makers to provide the Committee with the explanatory material that it requires to perform its role.
- 2.11 The Department of Premier and Cabinet (DPC) periodically reviews the Circular, ensuring it continues to meet the Committee's requirements.
- 2.12 In its 2017 Annual Report, the former Committee reported on the revision of Premier's Circular 2014/01:

The Department of the Premier and Cabinet and the DLGSC are currently reviewing their respective circulars and sought suggestions for improvements from the Committee. The Committee provided its suggestions in October 2017 and has maintained an open dialogue with the departments in order to ensure that the reviews are meaningful and effective. The Committee looks forward to the updated circulars being re-issued in 2018.¹⁴
- 2.13 In subsequent Annual Reports in the 40th Parliament, the former Committee stated, to its knowledge, Premier's Circular 2014/01 was yet to be updated and re-issued.¹⁵

¹² Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 19, *Annual Report 2020*, 19 November 2020, p 5.

¹³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 1, *City of Kalamunda Dogs Local Law*, 9 September 2021.

¹⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 10, *Annual Report 2017*, 17 May 2018, p 5.

¹⁵ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 15, *Annual Report 2018*, 4 April 2019, p 9; Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 17, *Annual Report 2019*, 18 June 2020, p 6; Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 19, *Annual Report 2020*, 19 November 2020, p 6.

- 2.14 On 14 July 2021, DPC advised the Committee it was reviewing Premier's Circular 2014/01 and proposed amendments for the Committee's consideration.
- 2.15 DPC issued Premier's Circular 2021/07 on 22 December 2021.¹⁶ The Circular contains the following changes, which should assist the Committee and other agencies:
- Where minor amendments to subsidiary legislation result from the making of primary legislation, only one Explanatory Memorandum from the Minister responsible for the primary legislation is required.¹⁷
 - The explanation for the incorporation of external material to include confirmation that the agency:
 - Has copies of Australian or Australian/New Zealand standards that are available to be inspected by the public free of charge, or if not, that it will do so
 - Advises the public of the availability of Australian or Australian/New Zealand standards on its website, or if not, that it will do so.¹⁸
 - Where amendments to more than one item of subsidiary legislation fall within the responsibility of the same Ministerial portfolio,¹⁹ the Committee will accept one Explanatory Memorandum covering all amendments.
 - For subsidiary legislation where notice of a disallowance resolution must be given less than 14 sitting days as provided for in section 42 of the *Interpretation Act 1984*, the agency must provide this documentation within five business days of the publication date.²⁰
 - Requiring a copy of any principal subsidiary legislation marked up with tracked changes by Parliamentary Counsel's Office.²¹
- 2.16 The requirement for agencies to provide free public access to standards is a key reform, addressing the Committee's long standing concerns about free public access to standards.²²
- 2.17 The Committee extends its thanks and appreciation to DPC for incorporating its requested changes to the Circular. The Committee particularly thanks Vivian Molan for her assistance and co-operation in facilitating the re-issuing of the new Circular.

¹⁶ This was published on the [Western Australian Government website](#) on 13 January 2022.

¹⁷ This reflects the existing arrangement between the Committee and Parliamentary Counsel. See Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament) report 3, *Procedures for dealing with consequential amendments to delegated legislation following enactment of primary legislation*, 12 October 2017.

¹⁸ Western Australia, Premier's Circular 2021/07, issued 22 December 2021, *Subsidiary Legislation – Explanatory Memoranda – Appendix 1 – Explanatory Memorandum Requirements*, p 2.

¹⁹ This is known as omnibus subsidiary legislation.

²⁰ The Committee encountered an instance where the 10 day period for providing the Explanatory Memorandum for an instrument expired only a few days before the last day for the Committee to move a motion to disallow the instrument.

²¹ This will assist the Committee scrutinize particularly long and complicated instruments.

²² Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (39th Parliament), report 84, *Access to Australian Standards adopted in delegated legislation*, 23 June 2016.

3 Issues in regulations

- 3.1 The Committee found that most regulations and other disallowable instruments made by the Executive that it scrutinised in the Reporting Period were well drafted and had only minor issues, if any.

Non-Coronial Post-Mortem Examinations Code of Practice 2021

- 3.2 Section 32A(2) of the *Human Tissue and Transplant Act 1982* (HTT Act) provides that section 42 of the *Interpretation Act 1984* applies to a code of practice as if it were a regulation.
- 3.3 The *Non-Coronial Post-Mortem Examinations Code of Practice 2021* (Code) contains principles and guidelines to be followed in the carrying out of non-coronial post-mortem examinations. This includes practices and procedures allowing the next of kin of deceased persons to make informed decisions about the retention of tissue following a post-mortem examination.
- 3.4 The Code adopts the following definition of tissue (emphasis added):
- “tissue”**, for the purposes of the Code, means a whole or a substantial part of a visibly recognised functional unit of the body such as the brain, heart and liver, *but does not include the small tissue samples that are required to be taken for testing by microscopic examination as part of every non-coronial post-mortem examination.*²³
- 3.5 This is the same definition that appeared in the *Non-Coronial Post-Mortem Examinations Code 2007* (2007 Code). The Committee in the 37th Parliament noted this definition is more restrictive than in the HTT Act, which defines tissue as follows:
- “tissue”** includes an organ or part of the human body or a substance extracted from, or from a part of, the human body.²⁴
- 3.6 Section 5 of the Code, which governs obligations of informed consent concerning whether tissue can be retained and the uses to which it can be put, applies only to organs. The narrower definition of tissue means next of kin are only required to be consulted about the use or retention of organs for diagnostic or non-diagnostic purposes. This could result in them providing consent to their use and retention where they are unaware that other body parts or substances may be retained for non-diagnostic purposes.
- 3.7 In 2007 the then Minister for Health gave the former Committee an undertaking to amend the definition of tissue in the 2007 Code to ensure it was consistent with the HTT Act. The 2007 Code was subsequently amended on 14 March 2008.
- 3.8 The Committee requested that the Minister for Health give an undertaking to amend the definition of tissue in the Code on the basis the definition of tissue in section 4 of the Code is inconsistent with the HTT Act and beyond power. This was on the basis:
- Subsidiary legislation must not be inconsistent with the provisions of the written law under which it is made.²⁵
 - The HTT Act contemplates informed consent as to the particular uses to which tissue, as defined in the Act, will be put. The Act does not contemplate a distinction in the

²³ *Non-Coronial Post-Mortem Examinations Code of Practice 2021*, cl 4.

²⁴ *Non-Coronial Post-Mortem Examinations Code 2007*, cl 4.

²⁵ *Interpretation Act 1984*, s 43(1).

requirement for consent between some tissues, as defined in the Act, and other tissues, as defined in the Code.

- 3.9 The Minister gave an undertaking to amend the definition of tissue to ensure it is consistent with the HTT Act.

4 Issues in local laws

Section 3.12(4) of the *Local Government Act 1995*

- 4.1 Local Governments must ensure their local laws are not significantly different from those publically advertised under section 3.12(3) of the *Local Government Act 1995* (LGA).²⁶

- 4.2 Section 3.12(4) of the LGA states:

(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.*

- 4.3 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.

- 4.4 Adopting a significantly different local law deprives the public of the opportunity to make submissions on significant changes.
- 4.5 In the Reporting Period, the Committee undertook detailed scrutiny of at least seven local laws that contained a number of differences from the advertised version. Some Explanatory Memoranda contained little or no detail on why the local government did not consider the changes made the local law significantly different.
- 4.6 While each case turns on its own facts, examples of the types of changes to local laws that the Committee has found to be significantly different are:
- increased penalties not contained in the proposed local law
 - imposing an obligation on certain members of the public where a breach attracts a significant penalty
 - prescribing a new pest plant where the purpose of the local law was to prescribe pest plants for the district²⁷
 - lowering the thickness threshold for reusable plastic bags from 60 microns to 35 microns²⁸

²⁶ Section 3.12 of the *Local Government Act 1995* is set out in Appendix 1.

²⁷ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (36th Parliament), report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, 31 August 2004.

²⁸ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 6, *Town of East Fremantle Plastic Bag Reduction Local Law 2017*, 30 November 2017.

- prescribing a different number of dogs that may be kept on premises.²⁹

4.7 In its sixth report, the former Committee in the 40th Parliament stated:

In the Committee's view, 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. Further, the second scenario contemplated by section 3.12(4), of adopting a local law that is 'not significantly different from what was proposed' is already a legislated concession to the requirement to adopt a local law 'as proposed' (the first scenario). Anything less than full compliance with section 3.12(4), in either scenario, would render the public consultation process envisaged by section 3.12 meaningless.³⁰

4.8 The Committee strongly encourages local governments to either:

- include sufficient detail in Explanatory Memorandums justifying why they consider the local law is not significantly different from the one publically advertised
- re-start the local law making process under section 3.12 of the LGA if any significant changes are made following public advertising.

4.9 This will assist Committee scrutiny and reduce the risk of Parliament disallowing the local law.

Town of Bassendean Cats Local Law 2021

4.10 Clause 2.2 of the *Town of Bassendean Cats Local Law 2021* stated:

2.2 Cats in places that are not public

- (1) A cat shall not be in any place that is not a public place unless consent to it being there has been given by the owner or occupier of the premises, or a person who has been authorised to consent on behalf of the owner or occupier.
- (2) If a cat is at any time in a place in contravention of subclause 2.2(1)—
 - (a) the owner of the cat commits an offence; and
 - (b) an authorised person may seize and impound the cat in accordance with the Act.

4.11 This clause operated so that a cat owner would have to effectively confine their cat(s) to their property to avoid committing an offence. This is because:

- if not confined, given their range, it is very likely cats will stroll onto other private property.
- it is impracticable to obtain consent from every private property owner in the district or even in close vicinity to the cat owner, making consent illusory.

4.12 The *Cat Act 2011* allows cats to be in public places unless they are not complying with the Act, including those requiring registration or sterilisation.

²⁹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 1, *City of Kalamunda Dogs Local Law 2021*, 9 September 2021.

³⁰ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (40th Parliament), report 6, *Town of East Fremantle Plastic Bag Reduction Local Law 2017*, 30 November 2017, p 10.

- 4.13 The Committee found that clause 2.2 was inconsistent with and therefore not authorised by the *Cat Act 2011*. The Committee requested and received from the Town of Bassendean an undertaking to delete clause 2.2.³¹

City of Fremantle Parking Local Law 2021

- 4.14 The *City of Fremantle Parking Local Law 2021* contained numerous typographical and formatting errors and also these more substantive issues:

- free public access to standards
- special event parking
- a determination device.

Access to standards

- 4.15 The local law adopted an Australian Standard in the definition of 'symbol'.
- 4.16 The Committee's position is that where external standards are adopted as part of a local law, residents should be able to access them easily and without charge. This derives from the principle that citizens should be able to access the law. Any barriers to access, including cost and not being aware about the availability of free access, undermines the rule of law.

Special event parking

- 4.17 The clause in the local law dealing with parking for special events was problematic for the following reasons:
- Although the definition of special event contained defined and objective criteria, it did not contain any time limit for special events. The City could, in theory, set aside unlimited space for an unlimited period of time for a special event. This does not provide sufficient certainty and, on that basis, was beyond power of section 3.1 of the LGA.
 - Sufficient public notice of special events should be given (for example, at least four weeks before the event) so the public is adequately informed. The clause allowed the City of Fremantle to erect a sign at any time, which could be on the day of the event, about special parking provisions.

Determination device

- 4.18 The Committee regards determination devices as problematic because they avoid scrutiny by the Parliament.³² Section 3.12 of the LGA is not required to be followed, in order to make, repeal or amend a determination. A determination device also by-passes the requirements of section 42 of the *Interpretation Act 1984* in relation to publication of the determination in the *Government Gazette*, tabling in both Houses of Parliament and disallowance.
- 4.19 The Committee has accepted the use of some determination devices in clauses, such as in parking local laws, but requires that the local government Council make each determination and that the determination be adequately signposted.
- 4.20 Clause 6.2 of the local law was a determination device. It uses the words 'local government' instead of 'Council'. The Committee's view is that where the words 'local government' are

³¹ For examples of former committees taking issue with cat local laws, see Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (39th Parliament), report 78, *Annual Report 2014*, 22 January 2015, pp 10-3; Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (39th Parliament), report 89, *Annual Report 2016*, 17 November 2016, pp 19-20.

³² Determination devices have been the subject of examination in a number of previous reports. See Western Australia, Legislative Council, report 19, *Annual Report 2020*, 19 November 2020, pp 13-4.

used, it is envisaged that the decision in question may be delegated to staff. Determining classes of parking permits and the eligibility for them are matters that should be considered by Council. They potentially affect a great many home or business owners, and are not always temporary in nature.

Undertakings by the City of Fremantle to amend the local law

- 4.21 The Committee sought and obtained undertakings from the City of Fremantle to amend these problematic clauses, together with all the typographical and formatting errors.

City of Belmont Consolidated Local Law 2020

- 4.22 Clause 1.7 of the *City of Belmont Consolidated Local Law 2020*³³ enabled the City to delegate any of its powers, functions and duties to the Chief Executive Officer (CEO). It also enabled the CEO to further delegate to any other City employee or authorised person.
- 4.23 Clause 1.7 was only subject to 'any inconsistent provision for delegation in the enabling legislation', which is the LGA.³⁴
- 4.24 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 body that has been delegated the power to make legislation cannot itself delegate this power, unless expressly authorised in the enabling legislation.
- 4.25 The LGA does not contain any power to sub-delegate. Further, some of the City's powers, functions and duties were legislative in nature.
- 4.26 Accordingly, the Committee regarded this clause as an unauthorised sub-delegation of legislative making power and sought and obtained an undertaking from the City to delete clause 1.7.

Other issues identified

- 4.27 Examples of other issues the Committee identified in local laws for which it received undertakings are:
- a clause restricting someone from tethering any animal other than a dog to a tree, shrub, tree guard, wall or fence drafted in such a way as to include someone's private property
 - duplicate clauses and penalties in waste local laws³⁵
 - access to Australian Standards³⁶
 - provisions governing election signs
 - inconsistency of a clause with regulation 12(1) of the *Local Government (Uniform Local Provisions) Regulations 1996*, which requires a permit for the construction of a crossing giving access from a public thoroughfare to private land

³³ Made by the City of Belmont on 27 October 2020 and gazetted on 14 January 2021.

³⁴ *City of Belmont Consolidated Local Law 2020*, cl 1.7(2).

³⁵ This arose from an error in the Western Australian Local Government Association template waste local law.

³⁶ It is pleasing that some local governments are now displaying the following definition in their local laws:

'AS' means an Australian Standard published by Standards Australia and available for viewing free of charge at the Shire of Waroona Administration Office.

This saves the Committee from having to enquire about free access to standards.

- a clause preventing the payment of compensation to an owner or occupier of premises where a local government carries out work unless resulting from negligence or breach of duty, which was inconsistent with section 3.22(1) of the LGA
- clauses referring to local laws not in force.

5 Local Government reform process

- 5.1 On 10 November 2021 the Minister for Local Government announced proposed reforms to the Local Government sector, including reforms relevant to the Committee's work, such as:
- standardisation of local government council meeting procedures
 - development of new model local laws
 - periodic review of local laws
 - specifying the roles and responsibilities of the Mayor or President, the Council and Councillors.³⁷
- 5.2 The DLGSC has summarised the proposed reforms on its [website](#). These include amendments to the LGA and associated regulations.
- 5.3 The DLGSC has informed the Committee it is considering public submissions. The Committee looks forward to receiving feedback from the Minister and the DLGSC once they are in a position to progress the reforms.



Mr Geoff Baker MLA
Chair

³⁷ Western Australian Government, *Media Statement, Major local government reforms released for public consultation*, 10 November 2021. See [Media Statements - Major local government reforms released for public consultation](#). Viewed 20 May 2022.

APPENDIX 1

LOCAL GOVERNMENT ACT 1995 SECTION 3.12

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.]

GLOSSARY

Term	Definition
CEO	Chief Executive Officer of the City of Belmont
Circular	Premier's Circular, <i>Subsidiary legislation—explanatory memoranda</i>
Code	<i>Non-Coronial Post-Mortem Examinations Code of Practice 2021</i>
2007 Code	<i>Non-Coronial Post-Mortem Examinations Code 2007</i>
Committee	Joint Standing Committee on Delegated Legislation
DLGSC	Department of Local Government, Sport and Cultural Industries
DPC	The Department of Premier and Cabinet
HTT Act	<i>Human Tissue and Transplant Act 1982</i>
LGA	<i>Local Government Act 1995</i>
Reporting Period	1 January 2021 to 31 December 2021
TOR	Terms of reference
WALGA	Western Australian Local Government Association

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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