

*Joint Standing Committee on Delegated Legislation — Third Report — Annual Report 2022*

Resumed from 23 March.

*Motion*

**Hon LORNA HARPER:** Originally, when I was going to stand to speak about this report, I was going to delve into the depths, but I acknowledge that this is the first committee report for the new member.

**The DEPUTY CHAIR:** Member, I will advise that you have to move that the report be noted.

**Hon LORNA HARPER:** All right. I move —

That the report be noted.

Sorry, I have a bit of a hearing problem today.

**Hon Kyle McGinn** interjected.

**Hon LORNA HARPER:** Oh, you are funny. I was going to delve into the depths of the report, but I would like to acknowledge that these are the first committee reports that Hon Louise Kingston has been at, so I thought I would go back to the beginning and explain what delegated legislation is—to the joy of everybody else in here!

**Hon Tjorn Sibma:** Tell us the members. It is standard.

**Hon LORNA HARPER:** One moment. I will expand it. Thank you, Hon Tjorn Sibma, for telling me what to do—just lovely. The delegated legislation committee is a joint standing committee, which means that four members are from this chamber and four members are from the other house, which we do not name. The current members from this house are me, the deputy chair; Hon Martin Pritchard; Hon Stephen Pratt; and Hon Steve Martin, who joined us on 23 November 2022.

**Hon Darren West:** There are too many Steves.

**Hon LORNA HARPER:** There are four Steves. It is even Stevens; we know. We meet weekly, and everybody loves delegated legislation. Basically, our role is —

... to consider instruments of delegated legislation published in the *Government Gazette* ...

- instruments that are subject to parliamentary disallowance
- instruments noted by an individual Member.

The majority of instruments sent to us are from local councils. When a local council makes a local law, it has to be gazetted. It is sent to us, and we have a look to see whether it meets our terms of reference.

Now, we move to the terms of reference. The current committee is the committee of the forty-first Parliament, and the current terms of reference were adopted on 25 May 2021, when this committee was established. If members have a copy of the report, the terms of reference are on the back page of the report.

Our terms of reference state —

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.

For this chamber, it was my pleasure to stand up and present this report —

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.

The terms of reference continue —

- 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.

To put it in layman's terms, we get local government laws coming through, including things like laws on fencing and pathways. Cats and dogs is a hugely popular item that comes through. If the member looks at the report, when we get the laws, we generally then look to make sure that they are fine.

Page 4 of the report contains a breakdown and a table of the committee's work statistics for 2022. We identified issues regarding why certain laws were disallowed. Of the laws, six per cent were disallowed because of unintended effects in which the instrument offended—I love that word—the committee's terms of reference. That means that those laws had an unintended effect on any person's existing rights or interests. Page 4 states —

This includes where an instrument attempts to erode fundamental common law rights such as personal liberty and proprietary rights.

Another issue we came across was regarding access to Australian standards, which refers to when an instrument incorporates Australian standards by reference, which become part of the law, but cannot be accessed free of charge. This is an ongoing issue. Of the issues, 31 per cent were due to a law being beyond power; an instrument will be made invalid if it is not authorised or contemplated by the empowering act. Irrespective of what the local government does, it still has to make sure that it is allowed to do so under the act and it is not stepping out. That comes in quite a lot. We get some interesting variations to local laws coming through the delegated legislation committee, as well as some interesting collusions by councils.

Overall, unfortunately even in this day and age of computers, 47 per cent of the issues were due to drafting errors. A long time ago when I started working, I worked at an accountant's office. We did not have a computer or word processor. We had an old-fashioned typewriter. Anybody who has had to type up accounts will know that in order to do them in triplicate, we used carbon paper. If a mistake was made on the account or whilst I was typing up, I then had to get my little pencil out and rub out that mistake on each copy with a little eraser and then go back to fix it. We did not even have correction ribbon. I thought it was wonderful when that came into effect; I loved it.

In this day and age of computers, it is actually quite disappointing that we have so many drafting errors. According to page 5, drafting errors can include —

- typographical or formatting errors
- cross-referencing to the wrong clauses or schedules
- clauses with missing text
- other errors which make the clause difficult to understand.

In saying that, the 47 per cent of drafting issues that we encountered in 2022 was actually a reduction from 66 per cent in 2021 and 70 per cent in 2022. Hopefully that means that we are moving forward and some of the local governments are taking more care. As a councillor, I can imagine that it is actually quite embarrassing to find out that legislation has been sent back because commas have been forgotten and certain words have been misspelled—I know I cannot pronounce half my words.

When a local law comes before the delegated legislation committee and we see that it is going to be disallowed, we request that the local government area give us an undertaking. The undertaking is generally to make sure that any identified errors are actually rectified. We need to ensure that if there is a part of a local law that is going to have unintended effects, it cannot be enforced. The member will generally find that the process is very easygoing and that there is an acceptance of it. Sometimes, there may be a council that will object and refuse. That is when it starts to get interesting because it then comes before this chamber and we have to look at the standing orders.

The last time I got up to speak about committee reports and delegated legislation, I said that ultimately, the decision-maker is this chamber. When I get up, the member will hear me ask that something “hereby be disallowed” on a general basis. When members then all say “Aye”, they are agreeing with us and the committee. At any point, even though I do not think they should do it, somebody in this chamber could say no and that they do not agree. That would be a lot more interesting.

We have occasionally had to have a few hearings and invite people in. The hearings are private because everything the committee does is to ensure confidentiality. They come in and we ask them questions about why they have done something and the reasoning behind it. We generally find that any issues can be resolved by meeting face to face. That is a bit of a last resort because we do not want to impede local councils; we just want them to follow what they need to do.

**Hon MARTIN PRITCHARD:** I am also on the committee and have been since I came into Parliament in 2015. In my view, it is actually quite an important committee, although people do tend to poke fun at it. It is good for a number of reasons. I think I mentioned once before that it is important that it is a large committee. It has eight members: four from each chamber. A quorum is four members, with at least one from each chamber. I think that is a very good strength of that particular committee. In the future, I think we might need to think about how we make up

committees. It is very often the case that a quorum can be difficult to achieve, particularly as we have quite a lot of members from country areas. Time periods set for reporting back to the chamber can make it difficult. Meetings have to be held out of session. As I said, when there are only four members in a committee and when the quorum is three, it can be very difficult.

The member has already had a bit of a rundown on what delegated legislation does. However, there are some interesting parts that I would like to briefly talk about. We tend to focus on local government laws because that is probably the majority of work that we do by far. However, there are a couple of other areas that I think are worthwhile to talk about. One area is on page 7 of the third report, *Annual report 2022*. It talks about the scale of fees that government departments can charge. The term of reference that covers this matter refers to whether the instrument “contains only matter that is appropriate for subsidiary legislation”. As Hon Lorna Harper stated, the power of the committee is only a subset of what is held by this particular chamber. One of the things that the committee and this chamber has oversight on is that government departments do not actually increase fees beyond what is actually required to cover costs. The fees cannot exceed the cost of recovery because if that happens, it is just a secret way of the department raising a tax. There are a couple of different ways that can be done. One is by just increasing the fee. At the moment, departments have to demonstrate to the committee the calculations for cost recovery they do. It is quite difficult, but I think it is very important. Another thing that often happens is that a raft of fees are increased, and there is a tendency for departments to occasionally cross-subsidise—so increasing one fee but having general fees cover general costs. Again, that is not allowed and the committee must oversee it. Departments can only recover costs; they cannot have a cheeky way of trying to raise tax.

Another term of reference I would like to point to is that there is no unintended effect on any person’s existing right or interest. This can be quite interesting. Page 13 of the report refers to quite an interesting situation of a local council having introduced a bylaw that allowed people to use their mobile phone in the changing room at the local pool. The reasoning behind it was quite sound; that is, if a person is in a changing room by themselves and has a heart attack or something like that, they can use the mobile phone to call for help. It was sound, but, of course, modern mobile phones have cameras, and it was felt that allowing this bylaw might open the possibility of pictures being taken in change rooms without people’s consent or desire to be photographed.

As Hon Lorna Harper indicated, we have a lot of back and forth with local councils. Although the initial response from the committee is to put a protective motion of disallowance on the notice paper, it is really only the start of the discussion that we must have. We put a disallowance on the notice paper because we have a certain time limit within which we can disallow, or recommend to this chamber to disallow, a local law. Very often, if we find difficulties with a local law, we put the motion on the notice paper just to protect the position of this chamber so it can make a decision about whether it should allow the bylaw to come on or should not and disallow it. That happens after the gazetting of that local law. The council will go through all the steps, introduce the law and gazette it, and then we get a copy to review, and we have a certain time to recommend disallowance or not. It is a little bit of a back-to-front mechanism in my view, but it seems to work. As I said, when we put a disallowance motion on the notice paper, it is really only the start of the discussions. The committee makes a number of determinations after that additional decision—for instance, whether the problems with the bylaw are so bad that it has to be disallowed or whether they are inconsequential. We decide whether the local government has substantially complied with the process and has hit a small hiccup along the way or it has missed vital parts of the process and the bylaw needs to be disallowed. There is this backward and forward discussion with the council, and it can often be resolved by the council giving a commitment to resolve the issues and making it known to its constituents that there are some things that cannot be enforced within the law. That is often the way things are resolved.

As I said, there are other things we look at. This report also goes to a very big issue at the moment—that is, bylaws with regards to cats and whether there is a right to require the owners of cats to confine them. It is a bit difficult because we have our terms of reference, so we consider these matters within them irrespective of our personal views. A constituent came to my office during the week from the City of Bayswater because it is tackling this issue at the moment. The city produced a bylaw that requires cat owners to confine their cats, and, unfortunately, in the committee’s view, it offends a term of reference. Therefore, we have had those ongoing discussions. As I said, the problem is that many members of the committee have views on whether cats should be confined, but we have to look at the issue within the parameters of the committee’s terms of reference. We cannot just bring our views —

**Hon Nick Goiran:** I heard the previous speaker indicate that it seems that the committee always has these hearings in private. Has that been your experience on this committee? I thought that was an interesting observation. Regarding the point you make about cats and the like, I would have thought many Western Australians would take an interest in a public hearing.

**Hon MARTIN PRITCHARD:** I am happy to respond to the interjection. We can have hearings in public. Hon Nick Goiran is a very experienced member, and he can understand that many of the considerations of the committee are in private so that we can have a cross-party deliberation and respect the information provided to us.

**The DEPUTY CHAIR:** The question is that the report be noted. Hon Martin Pritchard.

**Hon MARTIN PRITCHARD:** I understand that other members wish to speak, and I thank the deputy chair for giving me the call.

We can have public hearings, but it is probably only worthwhile having them if we believe they will contribute to the debate. In regard to the cat bylaws, it is pretty evident that there is no ability to confine cats. For instance, there is an ability to restrict cats in certain areas—that is very clear in the legislation—but whether the legislation allows cats to be confined is not really up for debate. If there was a public hearing and there was a view that cats should be able to be confined, the public hearing would not add to the debate. There will be a review of the cat bylaws next year, and it is of course open to the minister to deal with that issue separately, but it is not open to the committee to make a determination that leads that debate. We are not here to set policy for government; no committee is there to set policy for government. Committees are there to interpret issues within the parameters of their terms of reference.

**Hon DARREN WEST:** That is a bit of a hard act to follow in speaking on this *Annual report 2022*, but I want to make a few remarks. I acknowledge the wonderful contributions of Hon Lorna Harper and Hon Martin Pritchard, and the ease with which Hon Martin Pritchard handled the interjection and shone some clarity on that excellent question from across the chamber was something else. Well done, member.

I also will make some remarks about this fascinating Joint Standing Committee on Delegated Legislation. What the Joint Standing Committee on Delegated Legislation does might leave a country kid from a farm in wonderment, but as we have heard today and can see from this report, it is an outstanding committee that does terribly important work in upholding all kinds of laws and publications in the *Government Gazette*—or not. It is a great check and balance to have in this Parliament. I note some really good work has been done by the committee in this period from the calendar year of 2022, scrutinising, on behalf of Parliament, instruments made under statutory regulation by the Governor in Executive Council, ministers, statutory bodies and local governments. It is really important that we have this check and balance in place to scrutinise in a fair and fearless way. Well done to the members of the committee. For the benefit of Hon Tjorn Sibma, who I know is interested, as am I, in the make-up of this committee, there are some very steady heads and experienced campaigners here. The chair, Geoff Baker, MLA, is the Labor member for South Perth, which is unusual in itself. He is a great local member and an outstanding chair of this important committee. Our own Hon Lorna Harper, MLC, member for East Metropolitan is the deputy chair, so it has a fairly talented team. Members include Stuart Aubrey, MLA, member for Scarborough; Hon Stephen Pratt, MLC; Katrina Stratton, MLA, member for Nedlands; Hon Steve Martin, a fellow Agricultural Region representative who has recently joined the committee; Hon Martin Pritchard, as we heard from; and Christine Tonkin, MLA, member for Churchlands. There is a wide array of skill sets there, cross partisan of course, and a mixture of predominantly metro but also regional electorates. That is a really good mix. I know Hon Tjorn Sibma is curious about these things, so I thought it would be important to put that on the record. Staff are Alex Hickman and Sophia Simpson, who we all know are the hardworking and dedicated staff on this important committee.

I had a bit of a look through the report, given it was coming up today, and thought I would make a brief comment about its content. The report continues to list the terms of reference and the processes that the committee follows. As someone who has not been on the Joint Standing Committee on Delegated Legislation, which might be something to look forward to in a future term, I found it interesting to read the way that the committee works. It is unusual in its size. It is not unusual in that it is across both houses, but unusual in a size that requires four members to be a quorum. As the member said, there must be at least one from each house, which would continue to add that important scrutiny. I went straight to the committee's activities about the volume and nature of the committee's work in 2022. It had 14 meetings in the reporting period. It was certainly turning up to handle the task at hand. I was interested in the committee's work statistics for 2022 and the breakdown of issues. I noted that 47 per cent of all the issues that the committee faces are drafting errors. Is that not interesting? Nearly half the work the committee does is as a result of an error in drafting. I know that drafting is quite a fine art, and there are very few people across the state who are skilled at drafting legislation or local government laws and the like. It shows the importance of that work by how much work it creates and how many times there are errors in drafting. The other issues were sub-delegation, at three per cent, and beyond power at 31 per cent of the committee's work, which is interesting. I would be curious to read more and have a discussion another time about why that might be. Access to Australian standards was 13 per cent and unintended effect was six per cent. There was a wide array of issues for the committee to deal with. I am sure that these meetings take quite a deal of concentration when working on those issues.

Undertakings provided by the committee during the reporting period include the committee receiving departmental ministerial undertakings covering three instruments and local government undertakings covering 24 local laws. That is quite a lot of undertaking going on there. The local law working group is hosted by the Department of Local Government, Sport and Cultural Industries and comprises representatives from the office of the Minister for Local Government, the Western Australian Local Government Association, the Department of Health, the

Department of Water and Environmental Regulation, the Department of Treasury, and committee members and committee staff. They get together for no doubt a cross pollination of ideas and scrutiny of those under that remit.

The committee found that most regulations scrutinised in the reporting period were well drafted and only had a minor issue, if any. It is very heartening to know that the process of drafting regulations is in the main being handled well, and those regulations are being drafted correctly.

There is a breakdown on the Energy Regulations Amendment (Electricity Licensing) Regulations 2022, as there is for public trustee scale of fees, but I will flick forward to section 4 of the report, “Issues in local laws: Public disclosure of confidential committee correspondence”. That heading certainly grabbed my interest. It states —

All Committee correspondence to the Mayor or President of local government councils contains the following confidentiality warning:

This correspondence including any attachments is confidential and privileged. Your local government may only discuss the content of this letter and any attachments with the Western Australian Local Government Association, the Department of Local Government and the Shire’s legal advisors to the extent necessary to obtain information the Committee seeks. Each person to whom you distribute this material must be made aware of its confidential and privileged status.

It is quite a highly confidential requirement when dealing with this committee, and one that I was unaware of. I think that is really important. Time will beat me, but there are some great issues picked up in this report. I congratulate the committee on its outstanding work.

**Consideration of report postponed, pursuant to standing orders.**

**Progress reported and leave granted to sit again, pursuant to standing orders.**