



THIRTY-EIGHTH PARLIAMENT

REPORT 59

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***CITY OF SUBIACO MEETING PROCEDURES LOCAL
LAW 2012***

Presented by Mr Paul Miles MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

November 2012

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 Paul Miles MLA (Chairman)
Hon Helen Bullock MLC
Hon Jim Chown MLC
Hon Alyssa Hayden MLC

Hon Sally Talbot MLC (Deputy Chair)
Mr Vincent Catania MLA
Ms Janine Freeman MLA
Mr Andrew Waddell MLA

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ISBN 978-1-922047-20-5

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EXECUTIVE SUMMARY AND RECOMMENDATION OF THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
CITY OF SUBIACO MEETING PROCEDURES LOCAL LAW 2012

EXECUTIVE SUMMARY

- 1 Section 3.12(1) of the *Local Government Act 1995 (Act)* states that in making a local law, a local government is to follow the procedure in section 3.12.
- 2 The Joint Standing Committee on Delegated Legislation (**Committee**) has identified that the City of Subiaco did not follow the correct procedure described in the Act when it made the *City of Subiaco Meeting Procedures Local Law 2012 (Local Law)*.
- 3 The City of Subiaco failed to correctly follow the procedure outlined in section 3.12(3)(b) of the Act, in that it did not provide the Minister for Local Government with a copy of the proposed local law and the Statewide notice of the local law, as required. The City omitted to forward the Minister the Statewide notice. This results in the Local Law being invalid.
- 4 The Local Law is not authorised by the Act and, therefore, offends the Committee's *Term of Reference* 3.6(a).
- 5 The Committee recommended in Report 51: *Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, tabled on 16 August 2012, and previously in Report 48: *Town of Kwinana Extractive Industries Local Law 2011*, tabled on 3 May 2012, that the Act be amended to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of the local law.
- 6 The Minister for Local Government's response to this recommendation is noted at paragraphs 6.7 to 6.9 of this report. The Department of Local Government has made procedural changes.
- 7 The Committee anticipates that these procedural changes will result in significantly fewer invalid local laws being referred. However, until section 3.12 of the Act is amended, the Committee has no choice but to continue to recommend disallowance of a local law which has not strictly followed section 3.12.

- 8 The onus of responsibility with respect to understanding and following the correct procedure set out in section 3.12 of the Act lies with local governments.
- 9 The Committee remains of the view that section 3.12 should still be amended as recommended in Reports 48 and 51.

RECOMMENDATION

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Recommendation 1: The Committee recommends that the *City of Subiaco Meeting Procedures Local Law 2012* be disallowed.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

CITY OF SUBIACO MEETING PROCEDURES LOCAL LAW 2012

1 REFERRAL TO THE COMMITTEE

- 1.1 The *City of Subiaco Meeting Procedures Local Law 2012 (Local Law)* falls within the definition of ‘Instrument’ in the *Terms of Reference* of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Local Law was referred to the Committee upon publication in the *Western Australian Government Gazette*.¹

2 BACKGROUND

- 2.1 The Council of the City of Subiaco (**City**) commenced the process of making the Local Law at its meeting on 28 February 2012.
- 2.2 The procedure for making a local law is outlined in section 3.12 of the *Local Government Act 1995 (Act)*. A copy of section 3.12 is attached at Appendix 1.

3 SCRUTINY OF THE PROCEDURE FOR MAKING THE LOCAL LAW

- 3.1 The Committee first scrutinised the Local Law on 15 October 2012.
- 3.2 The City indicated that it had not complied with the requirement in section 3.12(3)(b) of the Act in its *Statutory Procedures Checklist* for the Local Law and in correspondence to the Committee² considered on 15 October 2012.
- 3.3 Section 3.12(3)(b) requires that:

The local government is to –

... as soon as the [Statewide public] 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. [Committee emphasis]

¹ The full text of the Local Law published in *Western Australian Government Gazette* No. 160 (Special) on 6 September 2012 is available from the State Law Publisher’s website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.

² Letter from Mr Neil Wilson, Manager, Governance and Customer Services, City of Subiaco, 24 September 2012.

- 3.4 According to sections 1.7 and 1.8 of the Act, 'Statewide public notice' requires a notice to be published in a newspaper circulating generally throughout the State, and exhibition of the notice to the public on a notice board at the local government's offices and to the public at every local government library in the district.
- 3.5 Statewide public notice for the Local Law was given on 17 and 18 March 2012.
- 3.6 The City did not comply with section 3.12(3)(b) because it did not forward the Minister for Local Government a copy of the Statewide public notice.
- 3.7 The Committee understands that the City electronically forwarded the Minister (through the Department of Local Government (**Department**)) a copy of the proposed local law, after the Statewide notice was published.³ However, the City did not also forward the Minister a copy of the Statewide notice as required. The letter from the City confirming this is attached at Appendix 2.
- 3.8 The Act is clear. Failure to forward the Statewide public notice and the proposed local law is non-compliance with section 3.12(3)(b).
- 3.9 As a result of this error, the procedure in section 3.12(3) of the Act for the Local Law has not been followed and the Local Law was invalidly made.

4 NON-COMPLIANCE WITH SECTION 3.12 OF THE ACT

- 4.1 The Committee has previously stated its position on the status of invalid local laws and the prospect of disallowance on nine other occasions since September 2010. These are set out in the Committee's reports listed at Appendix 3.⁴
- 4.2 This Local Law raises the same issue, in that the effect of not complying with the procedure in section 3.12 of the Act is that a local law will be invalid. In this case, a procedural step was not followed. In many other cases, non-compliance is the result of procedural steps not being followed in the correct sequential order.
- 4.3 As stated previously, an Instrument stands referred to the Committee at the time of its gazettal. Upon the tabling of a local law, there is an Instrument which may be subject to disallowance and the Parliament has the power to disallow a local law so tabled.⁵

³ The Department of Local Government has advised that they received a copy of the proposed local law but the Minister for Local Government was not provided with a copy of the Statewide notice: Electronic mail from Mr Steven Elliot, Senior Legislation Officer, Department of Local Government, 5 October 2012.

⁴ This list does not include Report 55: *City of Perth Standing Orders Amendment Local Law 2012*, tabled 13 September 2012, because the Committee withdrew its motion to disallow the *City of Perth Standing Orders Amendment Local Law 2012* after further evidence demonstrated that the City of Perth had correctly followed the procedures in section 3.12 of the *Local Government Act 1995*: see Special Report: *City of Perth Standing Orders Amendment Local Law 2012*, tabled 25 October 2012.

⁵ Section 42 of the *Interpretation Act 1984*.

- 4.4 In the Committee's view, tabled instruments that have not been correctly made by following the prescribed statutory procedure are not excluded from the power to disallow.

5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW

- 5.1 It is important to note that section 3.12(1) of the Act provides:

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.

- 5.2 Long-standing advice from the then Crown Solicitor's Office (now State Solicitor's Office) in January 2002 was that the procedure in section 3.12 is mandatory.⁶
- 5.3 Therefore, as the process outlined in section 3.12(3)(b) of the Act has not been followed correctly, the Local Law is invalid and capable of disallowance.
- 5.4 On 16 July 2012, Hon John Castrilli MLA, Minister for Local Government (**the Minister**), advised that he agreed with the Committee's position that local laws should be disallowed where a local government has failed to comply with the local law making process.⁷

6 REVIEW OF SECTION 3.12 OF THE ACT

- 6.1 This is the tenth occasion since September 2010 that the Committee has scrutinised a local law which has not correctly followed section 3.12 (see Appendix 3).
- 6.2 The Committee is concerned that the overly prescriptive nature of section 3.12 may be the cause of local laws being invalid. It appears that, prior to the publication of Department Circular Number 16-2012 on 22 June 2012 (**Department Circular**), local governments were unaware of the legal consequences of not complying exactly with all of the steps in section 3.12 in the order in which they are prescribed.
- 6.3 Errors result in significant resources and ratepayer money being expended by local governments to make laws which are ultimately found to be invalid and of no legal effect.
- 6.4 While the Committee is sympathetic to the intention of local governments when they fail to comply with the process in section 3.12, the Committee's *Terms of Reference* oblige it to investigate when an Instrument of subsidiary legislation is not made according to the requirements of its empowering statute.

⁶ The advice dated 31 January 2002 is copied in Appendix 4 to Report 42, Joint Standing Committee on Delegated Legislation, Report 42: *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and *Shire of Koorda Standing Orders Local Law 2009*, 16 September 2010.

⁷ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

6.5 The Committee is concerned that recommending disallowance of a local law in circumstances where section 3.12 is substantially complied unnecessarily impacts on the Committee, Parliament and local government time and resources.

6.6 The Committee recommended in Report 48: *Town of Kwinana Extractive Industries Local Law 2011*, tabled in both Houses on 3 May 2012 (**Report 48**), and Report 51: *Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, tabled in both Houses on 16 August 2012 (**Report 51**), that:

the Minister for Local Government amend the Local Government Act 1995 to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of the local law.

6.7 The Minister, in the Government Response to Report 51, advised that:

*The Committee's recommendation will be taken into consideration when amendments to the Act are progressed in 2013.*⁸

6.8 The Minister also advised that:

- an updated the *Statutory Procedures Checklist* has been amended to remove any ambiguity as to how the law-making process should be completed;
- the Department Circular has been issued to all local governments emphasising that compliance with section 3.12 of the LG Act is a statutory requirement, not a mere administrative process; and
- the Department of Local Government has made procedural changes. When a compliance issue is identified regarding a proposed local law, the department will advise the local government to restart the law-making process.⁹

6.9 The Minister expressed the view that the above changes will ensure that local governments comply with the law-making process and that potentially invalid laws are not gazetted. The Minister advised that he will continue to monitor this issue.¹⁰

6.10 The Committee anticipates that these procedural changes will result in significantly fewer invalid local laws being referred. However, until section 3.12 of the Act is amended, the Committee has no choice but to continue to recommend disallowance of a local law which has not strictly followed section 3.12.

⁸ Letter from Hon John Castrilli MLA, Minister for Local Government, 10 September 2012, p1: Legislative Council, Tabled Paper No. 4904.

⁹ Ibid, pp1-2.

¹⁰ Ibid, p2.

6.11 The onus of responsibility with respect to understanding and following the correct procedure set out in section 3.12 of the Act lies with local governments.

6.12 The Committee remains of the view that section 3.12 should still be amended as recommended in Reports 48 and 51.

7 CONCLUSIONS

7.1 The Committee has concluded that the Local Law offends its *Term of Reference* 3.6(a) on the basis of non-compliance with a mandatory requirement in section 3.12(3)(b) of the Act.

7.2 The Committee has, therefore, resolved to recommend that the House disallow the Local Law, as it is of the view that the Local Law is invalid and not authorised by the Act.

7.3 As outlined in previous reports, 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.

8 RECOMMENDATION

Recommendation 1: The Committee recommends that the *City of Subiaco Meeting Procedures Local Law 2012* be disallowed.

8.1 The Committee commends its report to the House.



Mr Paul Miles MLA
Chairman

8 November 2012

APPENDIX 1

SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

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.
- (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 Statewide 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;
 - (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;
 - (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) A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.
- (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;
 - (b) summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and
 - (c) advising that copies of the local law may be inspected 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.

APPENDIX 2

LETTER FROM THE CITY OF SUBIACO



Enquiries: Stephen Tindale
File: A/724-03

24 October 2012

Mr Paul Miles
Chairman
Joint Standing Committee on Delegated Legislation
GPO Box A11
PERTH WA 6837

All communications should be directed to the
Chief Executive Officer

241 Rokeby Road SUBIACO WA 6008
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Telephone: 08 9237 9222 Facsimile: 08 9237 9200
Email: city@subiaco.wa.gov.au Website: www.subiaco.wa.gov.au



Dear Sir

CITY OF SUBIACO MEETING PROCEDURES LOCAL LAW 2012 - YOUR REFERENCE 3899/19

I acknowledge your letter of 16 October 2012 addressed to Mayor Heather Henderson and confirm that according to our records the City of Subiaco did not forward a copy of the proposed Local Law and the Statewide public notice to the Minister for Local Government (on 17 and 18 March 2012) as soon as a copy of the Statewide notice was given as is required by section 3.12(3)(b) of the Act.

This has been confirmed by the Department of Local Government and the Ministers office advising (on request from the City) that they had no receipt of the Statewide public notice.

Accordingly it is understood that the Local Law will be declared invalid.

However, what I seek is advice from the Joint Standing Committee on Delegated Legislation is that the content of the Local Law is correct and that if the process is recommenced it would not encounter any problems as to content or form.

I await your response.

Yours sincerely

STEPHEN TINDALE
CHIEF EXECUTIVE OFFICER

APPENDIX 3

COMMITTEE REPORTS WHERE THE COMMITTEE HAS RECOMMENDED DISALLOWANCE OF INVALID LOCAL LAWS

1. Report 42: *Town of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Town of Koorda Standing Orders Local Law 2009*;¹¹
2. Report 45: *Shire of Kellerberrin Dogs Local Law*;¹²
3. Report 47: *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;¹³
4. Report 48: *Town of Kwinana Extractive Industries Local Law 2011*;¹⁴
5. Report 51: *Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*;¹⁵
6. Report 53: *Mindarie Regional Council Standing Orders Amendment Local Law 2012*;¹⁶

¹¹ Joint Standing Committee on Delegated Legislation, Report 42, *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, tabled on 16 September 2010. These two local laws raised the same issue for the Committee in that both Instruments were gazetted in error. In each case, the Instrument gazetted was not the one adopted by the Shire Council or subject to the procedure set out under section 3.12 of the *Local Government Act 1995*.

¹² Joint Standing Committee on Delegated Legislation, Report 45, *Shire of Kellerberrin Dogs Local Law*, tabled on 3 November 2011. The Committee formed the view that the local law had been invalidly made, based on non-compliance with sections 3.12(5) and (6) of the *Local Government Act 1995*. The Committee recommended that the Executive Council advise the Governor to invoke section 3.17 of the *Local Government Act 1995* to repeal the local law. This course of action was chosen because due to an administrative error, a notice of motion to disallow was not moved in the Legislative Council.

¹³ Joint Standing Committee on Delegated Legislation, Report 47, *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, tabled on 3 May 2012. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and a then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

¹⁴ Joint Standing Committee on Delegated Legislation, Report 48, *Town of Kwinana Extractive Industries Local Law 2011*, tabled on 3 May 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the Statewide public notice and proposed local law was given to the Minister six days before the Statewide public notice was published.

¹⁵ Joint Standing Committee on Delegated Legislation, Report 51, *Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, tabled on 16 August 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the Statewide public notice and proposed local law was given to the Minister one day before the Statewide public notice was published.

¹⁶ Joint Standing Committee on Delegated Legislation, Report 53, *Mindarie Regional Council Standing Orders Amendment Local Law 2012*, tabled on 13 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that the Minister was never given a copy of the Statewide public notice contrary to section 3.12(3)(b) of the Act.

7. Report 54: *City of Bayswater Standing Orders Local Law 2012*;¹⁷
8. Report 57: *Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012*.¹⁸
9. Report 58: *City of Vincent Dogs Amendment Local Law No. 2 2012*.¹⁹

¹⁷ Joint Standing Committee on Delegated Legislation, Report 54, *City of Bayswater Standing Orders Local Law 2012*, tabled on 13 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the Statewide public notice and proposed local law was given to the Minister eight days before the Statewide public notice was published.

¹⁸ Joint Standing Committee on Delegated Legislation, Report 57, *Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012*, tabled on 27 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the Statewide public notice and proposed local law was given to the Minister six days before the Statewide public notice was published.

¹⁹ Joint Standing Committee on Delegated Legislation, Report 58, *City of Vincent Dogs Amendment Local Law No. 2 2012*, tabled on 18 October 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the Statewide public notice and proposed local law was given to the Minister four days before the Statewide public notice was published.
