



THIRTY-NINTH PARLIAMENT

REPORT 87

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

**OBSERVATIONS ARISING FROM THE COMMITTEE
REVIEW OF THE *CITY OF JOONDALUP LOCAL
GOVERNMENT AND PUBLIC PROPERTY
AMENDMENT LOCAL LAW 2015***

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

September 2016

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

The following is an extract from Schedule 1 to 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 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*.'

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chairman)

Hon Robin Chapple MLC (Deputy Chair)

Hon John Castrilli MLA

Hon Peter Katsambanis MLC

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Government Response

This Report is subject to Legislative Council Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or the Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

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

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 A determination device is a means by which the council of a local government purports in a local law to sub-delegate the exercise of its powers under the *Local Government Act 1995* (the Act) to a mere resolution of a simple majority of the council members, or to the administrative arm of the local government.
- 2 When considering local laws, the Joint Standing Committee on Delegated Legislation (the Committee) has regard to the hierarchy of the primary legislation, delegated instruments and other documents which take on legal effect; that is, in ranking order:
 - the Act and any amendments to it (scrutinised by Parliament)
 - regulations made under the Act (scrutinised by this Committee under the terms of section 42 of the *Interpretation Act 1984* and the Standing Orders of the Legislative Council, and a matter for the Legislative Council if recommended for disallowance)
 - local laws made under Part 3, Division 2 of the Act (again scrutinised by this Committee, and a matter for the Legislative Council if recommended for disallowance) and
 - ‘determinations’, ‘policies’ or ‘lists’ made by local governments under powers included in local laws (not disallowable, and thus not scrutinised).
- 3 Each of the legislative tiers below the principal statute involves a delegation. Many a debate has been had as to where the line should be drawn between each tier. Using recent examples, should laws relating to the prescription of mental health illnesses be in primary legislation or regulations? Should bans on smoking or plastic carrier bags be in primary legislation, regulations or local laws? Moreover, what type of matter should be permitted in determinations or other means of sub-delegation?
- 4 It is a fundamental principle of administrative law that, where a parliament delegates a power or function to a person or body, that person or body must exercise the power or function personally, and must not delegate it to another: *‘delegatus non potest delegare’*. Generally, the exercise of the power or function by another will be invalid. Local laws are, of course, made under powers delegated to local governments by Parliament under the terms of the Act.

- 5 For practical and administrative reasons, given the sheer volume of decisions that must be taken by public bodies or officials, a body of law has grown up that allows for a delegation of authority in certain circumstances.
- 6 The issue that arose with the *City of Joondalup Local Government and Public Property Amendment Local Law 2015* (the Amendment Local Law) was that, whilst the amendment made by the City of Joondalup (City) was in and of itself unobjectionable, the exercise of the power under the delegation was arguably not. The City imposed a blanket ban on an activity - the placing and maintenance of charity collection bins - without consideration of individual circumstances. This was a policy that may have been challengeable in the courts on public law grounds by anyone with standing, such as a local charity, for being potentially unreasonable or disproportionate, or an unlawful fetter on discretion. However, the making of the determination which brought the policy into effect by the City is outside of the scrutiny powers of this Committee.
- 7 For reasons that will be outlined, the Committee felt unable in the circumstances to recommend to the Legislative Council that the Amendment Local Law be disallowed.
- 8 The Committee did resolve however, at its meeting on 23 March 2016, to provide a report to be tabled in both Houses of the Parliament on the issues arising from its scrutiny of the Amendment Local Law, under the powers inherent in Schedule 1 to the Standing Orders of the Legislative Council.
- 9 The Committee remains concerned at the exercise of the determination-making power by the City in this instance, considering that exercise to be unnecessary and unjustified in all of the circumstances, when a straightforward case-by-case approach would have been more reasonable and appropriate, whilst achieving the purported aims of the local government.
- 10 The issue for further consideration is whether a local government could or should be prevented from making a determination with potentially unlawful effect, so that recourse to the courts by anyone adversely affected is unnecessary.

FINDINGS AND RECOMMENDATIONS

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Finding: The Committee finds that, whilst it has a duty to ensure that any sub-delegation contained in delegated legislation is lawful, reasonable and appropriate, it has no authority over the actual exercise of that sub-delegated power.

Recommendation: The Committee recommends that the Minister for Local Government and Communities investigates administrative or legislative measures whereby local governments that exercise powers to make determinations that may impact on the existing rights of groups or individuals must act reasonably in all circumstances and ensure that a means exists whereby such determinations may be reviewed.

CHAPTER 1

FUNCTIONS AND POWERS OF LOCAL GOVERNMENTS

- 1.1 Part 3 of the *Local Government Act 1995* (the Act) sets out the functions of a local government in Western Australia, its general function being ‘*to provide for the good government of persons in its district.*’¹ Section 3.1(2) provides some restraint, stating:

The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.

- 1.2 On the other hand, section 3.1(3) provides that ‘*A liberal approach is to be taken to the construction of the scope of the general function of a local government.*’ Section 3.4 goes on to provide that the general function of a local government ‘*includes legislative and executive functions.*’ The distinction between these two functions has been of considerable interest to the Joint Standing Committee on Delegated Legislation (the Committee) and other like Committees in other jurisdictions, and is of some importance. Suffice to say, at this stage, that the legislative function involves the making of local laws under section 3.5(1), which 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 under this Act.

- 1.3 By virtue of section 42 of the *Interpretation Act 1984*, such local laws must be published in the *Western Australian Government Gazette*, at which point, under clause 10.5 of Schedule 1 to the Standing Orders of the Legislative Council of Western Australia, that local law stands referred to this Committee for consideration.
- 1.4 It is increasingly common for local governments to expressly reserve to themselves in local laws the power to make rules, policies or determinations in respect of things that may or may not be done, particularly in those local laws which relate to publicly or local government-owned property. Such instruments are not subject to section 42 of the *Interpretation Act 1984*, and are therefore not referred to nor scrutinised by this Committee. They are not disallowable by Parliament in the way that local laws themselves are.

¹ *Local Government Act 1995* s 3.1(1), sometimes referred to as the ‘good governance’ powers – see paragraph 2.22 below.

CHAPTER 2

THE CITY OF JOONDALUP LOCAL GOVERNMENT AND PUBLIC PROPERTY LOCAL LAW 2014

THE PRINCIPAL LOCAL LAW

Origins and making

2.1 Section 3.16 of the Act requires local governments to undertake a review of local laws within eight years of the date of their making, or of the date of the last periodic review, in order to determine whether the laws should be amended or repealed. The City of Joondalup (City) undertook a review of its previously-made laws, particularly for the purposes of this Report, the *City of Joondalup Local Government and Public Property Local Law 1999*, in 2013, and subsequently began the process of making this new law. Its effect was the repeal and consolidation of three existing local laws, being:

- the *City of Joondalup Local Government and Public Property Local Law 1999*
- the *City of Joondalup Trading in Public Places Local Law 1999*, and
- the *City of Joondalup Signs Local Law 1999* (Part 4).

2.2 The ‘Purpose and Effect’ of the *City of Joondalup Local Government and Public Property Local Law 2014* (the Principal Local Law) were said to be:

Purpose

To provide for the regulation, control and management of activities and facilities on local government and public property within the district.

Effect

To establish the requirements with which any persons using or being on local government and public property within the district must comply.²

2.3 Having resolved to make the law at its meeting of 15 April 2014, the City advertised it in June 2014 in *The West Australian* and the *Joondalup Times*, and public notices were placed in the City’s Administration Centre, the Whitford Customer Service

² City of Joondalup Minutes of Council meeting, 15 April 2014, p 41.

Centre, all City libraries and on the City's website.³ A copy of the draft local law was also sent to the Minister for Local Government and Communities on 29 April 2014. These steps are all required by section 3.12 of the Act (headed '*Procedure for making local law*').

- 2.4 At the same time, the City also sought the approval of the Governor of Western Australia to effectively extend its western boundary 200 metres seaward from the low water mark, so as to allow for the enforcement of the proposed local laws in relation to reserves, beaches and bathing. Section 3.6 of the Act allows the Governor to give approval to a local government to make local laws that apply outside its district. Notice of that approval was published in the *Western Australian Government Gazette* on 2 December 2014.
- 2.5 The Principal Local Law was eventually formally adopted by the City Council at its meeting on 9 December 2014, and it was duly published in the *Western Australian Government Gazette* on 14 January 2015. As mentioned above, under the Standing Orders of the Legislative Council, that law then stood referred to this Committee, which considered it at its meetings of 22 April and 6 May 2015. At the first of these meetings, the Committee resolved to move a Notice of Motion to disallow the instrument in the Legislative Council, to allow time for further consideration of a matter not relevant to this Report, but at the second meeting, it was resolved that a motion to discharge that Notice would be moved. No further action on the part of the City was required.

The power to make determinations

- 2.6 The matter that was to become of concern to the Committee, which first took effect in this Principal Local Law but became controversial when subsequently amended and broadened by the *City of Joondalup Local Government and Public Property Amendment Local Law 2015* (the Amendment Local Law) was contained in Part 2 – '*Determinations in respect of local government property.*' For ease of reference and understanding, this Part is set out here in full:

Division 1 – Determinations

2.1 Determinations as to use of local government property

- (1) *The local government may make a determination in accordance with clause 2.2—*
- (a) *setting aside specified local government property for the pursuit of all or any of the activities referred to in clause 2.7;*

³ City of Joondalup website, www.joondalup.wa.gov.au, viewed on 3 August 2016.

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- (b) prohibiting a person from pursuing all or any of the activities referred to in clause 2.8 on specified local government property;*
 - (c) as to the matters in clauses 2.7(2) and 2.8(2); and*
 - (d) as to any matter ancillary or necessary to give effect to a determination.*
- (2) The determinations in Schedule 2—*
- (a) are to be taken to have been made in accordance with clause 2.2;*
 - (b) may be amended or revoked in accordance with clause 2.6; and*
 - (c) have effect on the commencement day.*

2.2 Procedure for making a determination

- (1) The local government is to give local public notice of its intention to make a determination.*
- (2) The local public notice referred to in subclause (1) is to state that—*
 - (a) the local government intends to make a determination, the purpose and effect of which is summarised in the notice;*
 - (b) a copy of the proposed determination may be inspected and obtained from the local government's offices; and*
 - (c) submissions in writing about the proposed determination may be lodged with the local government within 21 days after the date of publication.*
- (3) If no submissions are received in accordance with subclause (2)(c), the local government is to decide—*
 - (a) to give local public notice that the proposed determination has effect as a determination on and from the date of publication;*
 - (b) to amend the proposed determination, in which case subclause (5) will apply; or*
 - (c) not to continue with the proposed determination.*
- (4) If submissions are received in accordance with subclause (2)(c), the local government—*
 - (a) is to consider those submissions; and*
 - (b) is to decide—*
 - (i) whether or not to amend the proposed determination; or*
 - (ii) not to continue with the proposed determination.*
- (5) If the local government decides to amend the proposed determination, it is to give local public notice—*
 - (a) of the effect of the amendments; and*
 - (b) that the proposed determination has effect as a determination on and from the date of publication.*

- (6) *If the local government decides not to amend the proposed determination, it is to give local public notice that the proposed determination has effect as a determination on and from the date of publication.*
- (7) *A proposed determination is to have effect as a determination on and from the date of publication of the local public notice referred to in subclauses (3), (5) and (6).*
- (8) *A decision under subclause (3) or (4) is not to be delegated by Council.*

2.3 Discretion to erect sign

The local government may erect a sign on local government property to give notice of the effect of a determination which applies to that property.

2.4 Determination to be complied with

A person must comply with a determination.

2.5 Register of determinations

- (1) *The local government is to keep a register of determinations made under clause 2.1, and of any amendments to or revocations of determinations made under clause 2.6.*
- (2) *Sections 5.94 and 5.95 of the Act apply to the register referred to in subclause (1) and for that purpose the register is to be taken to be information within section 5.94(u)(i) of the Act.*

2.6 Amendment or revocation of a determination

- (1) *The local government may amend or revoke a determination.*
- (2) *The provisions of clause 2.2 are to apply to an amendment of a determination as if the amendment were a proposed determination.*
- (3) *If the local government revokes a determination it is to give local public notice of the revocation and the determination is to cease to have effect on the date of publication.*

Division 2—Activities which may be pursued or prohibited under a determination

2.7 Activities which may be pursued on specified local government property

- (1) *A determination may provide that specified local government property is set aside as an area on which a person may—*
 - (a) *bring, ride or drive an animal;*
 - (b) *take, ride or drive a vehicle, or a particular class of vehicle;*
 - (c) *fly or use a motorised model aircraft, car, ship, glider or rocket;*

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- (d) use a children's playground provided that the person is under an age specified in the determination, but the determination is not to apply to a person having the charge of a person under the specified age;*
 - (e) launch, beach, retrieve or leave a boat;*
 - (f) take or use a boat, or a particular class of boat;*
 - (g) deposit refuse, rubbish or liquid waste, whether or not of particular classes, and whether or not in specified areas of that local government property;*
 - (h) play or practice—*
 - (i) golf or archery;*
 - (ii) pistol or rifle shooting, but subject to the compliance of that person with the Firearms Act 1973; or*
 - (iii) a similar activity, specified in the determination, involving the use of a projectile which, in the opinion of the local government may cause injury or damage to a person or property;*
 - (iv) ride a bicycle, a wheeled recreational device, a sandboard or a similar device; or*
 - (v) wear no clothing.*
- (2) A determination may specify the extent to which and the manner in which an activity referred to in subclause (1) may be pursued and in particular—*
- (a) the days and times during which the activity may be pursued;*
 - (b) that an activity may be pursued on a class of local government property, specified local government property or all local government property;*
 - (c) that an activity is to be taken to be prohibited on all local government property other than that specified in the determination;*
 - (d) may limit the activity to a class of vehicles, boats, equipment or things, or may extend it to all vehicles, boats, equipment or things;*
 - (e) may specify that the activity can be pursued by a class of persons or all persons; and*
 - (f) may distinguish between different classes of the activity.*

2.8 Activities which may be prohibited on specified local government property

- (1) A determination may provide that a person is prohibited from pursuing all or any of the following activities on specified local government property—*
- (a) smoking on premises;*
 - (b) riding a bicycle, a wheeled recreational device, a sandboard or a similar device;*
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- (c) *taking, riding or driving a vehicle on the property or a particular class of vehicle;*
 - (d) *riding or driving a vehicle of a particular class or any vehicle above a specified speed;*
 - (e) *taking or using a boat, or a particular class of boat;*
 - (f) *the playing or practice of—*
 - (i) *golf, archery, pistol shooting or rifle shooting; or*
 - (ii) *a similar activity, specified in the determination, involving the use of a projectile which, in the opinion of the local government may cause injury or damage to a person or property;*
 - (g) *the playing or practice of any ball game which may cause detriment to the property or any fauna on the property; and*
 - (h) *the traversing of sand dunes or land which in the opinion of the local government has environmental value warranting such protection, either absolutely or except by paths provided for that purpose.*
- (2) *A determination may specify the extent to which and the manner in which a person is prohibited from pursuing an activity referred to in subclause (1) and, in particular—*
- (a) *the days and times during which the activity is prohibited;*
 - (b) *that an activity is prohibited on a class of local government property, specified local government property or all local government property;*
 - (c) *that an activity is prohibited in respect of a class of vehicles, boats, equipment or things, or all vehicles, boats, equipment or things;*
 - (d) *that an activity is prohibited in respect of a class of persons or all persons; and*
 - (e) *may distinguish between different classes of the activity.*
- (3) *In this clause—*
- premises*** *means a building, stadium or similar structure which is local government property, but not an open space such as a park or a playing field.*

Division 3—Transitional

2.9 Signs taken to be determinations

- (1) *Where a sign erected on local government property has been erected under a local law of the local government that is repealed by this local law, then it is to be taken to be and has effect as a determination on and from the commencement day, except to the extent that the sign is inconsistent with any provision of this local law or any determination made under clause 2.1.*
- (2) *Clause 2.5 does not apply to a sign referred to in subclause (1).*

- 2.7 It must be pointed out that these provisions are not novel or unique. Indeed, they are based almost entirely on a template local law produced by the Western Australia Local Government Association (WALGA). As a result, the same or similar provisions appear in many other local laws across the State. Judicious and temperate use of determination devices provides a significant administrative advantage to local governments, which might otherwise have been forced to go through the legislative procedures necessary to make or amend a local law simply in order to enforce minor localised restrictions on behaviours.

**THE CITY OF JOONDALUP LOCAL GOVERNMENT AND PUBLIC PROPERTY AMENDMENT
LOCAL LAW 2015**

- 2.8 At a Council meeting held on 9 November 2015, the City adopted the Amendment Local Law. This instrument made a very simple but important amendment to Part 2 of the Principal Local Law, as set out at paragraph 2.6 above, by adding to clause 2.8(1)(a) – (h) above (the list of activities which may be prohibited by determination on specified local government property) the following:

(i) the placing or maintaining of a collection bin.

The term ‘*Collection bin*’ was defined in an amendment to the definitions clause of the Principal Local Law as meaning ‘*a receptacle for the collection of clothing or goods.*’

- 2.9 Put briefly, these amendments permitted the local government to make a determination under the procedures outlined at clause 2.2 of the Principal Local Law which would have the effect of prohibiting the placing or maintaining of charitable collection bins on local government property, such as City owned car parks or shopping malls.

Reasons for the amendment

- 2.10 Following the making of the Amendment Local Law by the City Council, but prior to this Committee’s consideration of it, a letter was received from Troy Pickard, the Mayor of the City, dated 18 November 2015.

- 2.11 The letter put forth a number of points in support of the amendment:

- charity clothing collection bins had been a constant cause of complaints from local residents due to the dumping of unused materials around those bins, associated graffiti, vandalism and anti-social behaviour

- whilst the method of collection using these collection bins had served some charities well, the community could not be expected to endure these negative impacts
- the Council believed that there was strong support for this position, and
- a more ‘*efficient, effective and contemporary*’ collection method had been set up, involving a Clothing Collection Working Group, which was exploring a range of alternatives such as clothing collection days, a school collection programme and working with local shopping centres.⁴

2.12 By way of background, the Mayor stated:

*The Council considered the matter at its meeting in June 2015. At that time, there were 76 charity clothing collection bins located on various City properties. Good Samaritan Industries (GSI) and the Spine and Limb Foundation (SLF) accounted for the majority of these collection bins with a small number from Anglicare. The permits that had been issued under the Local Government and Public Property Local Law for most of these bins had expired.*⁵

2.13 The City Council had resolved at that meeting to cease issuing new permits for the placing of collection bins, and to require the removal of all bins for which permits had expired. The placing of such receptacles fell within Part 3, Division 1 of the Principal Local Law, ‘*When a permit is required*’, more particularly clause 3.1, which reads:

Activities needing a permit

(1) A person must not without a permit:

(t) deposit or store any thing on local government property.

2.14 In the event, it seems that the decision taken at that 23 June 2015 City Council meeting, to cease renewing permits to place charity collection bins, was challenged in the State Administrative Tribunal (SAT) by the Good Samaritans Industry and the Spine and Limb Foundation.

2.15 The Mayor’s letter went on:

Even if the current matters before the SAT are eventually resolved in the City's favour there is nothing preventing new permit applications

⁴ T Pickard, City of Joondalup, Letter, 18 November 2016.

⁵ Ibid, pp 1-2.

being lodged for the placement of charity clothing collection bins at other sites on City public property.

For these reasons, the Council has resolved to make an amendment to the Local Government and Public Property Local Law to enable it to be able to determine that the placement of charity clothing collection bins on City public property is a prohibited activity.⁶

Consideration of the Amendment Local Law

- 2.16 The Amendment Local Law adopted by the Council on 9 November 2015 was published in the Western Australian *Government Gazette* on 13 November 2015. It fell to be considered by this Committee on 17 February 2016, where it was resolved to defer full consideration of the instrument until it had been made aware of the outcome of a City Council meeting that had taken place the evening before.
- 2.17 It was subsequently reported to the Committee⁷ that the City Council had resolved on 16 February 2016 to make the determination in question — that the placement or maintenance of charity clothing bins on City property is a prohibited activity.
- 2.18 The following paragraphs appeared in the Executive Summary of the Corporate Services Director of the City on the Council’s Agenda for that meeting:

While the resolution [of 23 June 2015] sets out a clear position of Council, it does not prevent an application for a permit being made under the local law to place a charity clothing collection bin on City property. The City is required to consider any application for a permit, and if approval is declined, the applicant has a right of objection and review.

To prohibit an activity completely (thereby removing appeal and review rights) requires the activity to be classed as a prohibited activity under the local law, by way of a Council determination. The local law needed to be amended to enable Council to make such a determination.⁸

- 2.19 Thus, it is clear that the decision of the City Council was taken (as is further evident from the minutes of that meeting)⁹ in the full knowledge that its ancillary purpose was to deprive potential permit applicants from having any right to apply, and therefore

⁶ Ibid, p 2.

⁷ J Byrne, Governance Coordinator, City of Joondalup, Electronic Mail, 17 February 2016.

⁸ City of Joondalup, Agenda for Meeting of Council, 16 February 2016, p 120.

⁹ City of Joondalup, Minutes of Meeting of Council, 16 February 2016, pp 174-178.

any right to appeal and review an adverse decision on such an application (such as the right exercised by the two charities mentioned in paragraph 2.14 above under Part 9 of the Act).

- 2.20 At its subsequent meeting, on 24 February 2016, this Committee decided that no further action should be taken in respect of the Amendment Local Law. The following matters were considered in reaching that conclusion.

Term of Reference 10.6(a) - Within power?

- 2.21 Members took account of the fact that the Amendment Local Law, in and of itself, is not legislatively offensive and did not offend against the Committee's Term of Reference 10.6(a), which reads:

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

(a) is within power.

- 2.22 The 'good governance' powers of a local government (paragraph 1.1 above) require it to eliminate activities that are causing a nuisance to local residents, and it is not uncommon to see charity collection bins abused or looted, with resultant mess and inconvenience. This particular instrument simply amends the part of the existing Principal Local Law which allows the City Council to make a determination as to conduct in its district. This, in the Committee's view, was within power. Thus, the Committee found, widening the power to make a determination on this subject matter was not unreasonable — it is the subsequent exercise of that power that may be, in that the ban could and should have been particularised towards individual problem locations rather than all-encompassing.

- 2.23 If the instrument actually before the Committee (the Amendment Local Law) were imposing the total ban on collection bins in local government areas, a number of public law issues would have arisen for the Committee in considering whether it was within power.

- *Proportionality*: the Committee would be obliged to consider whether the ban was a proportionate use of the City Council's powers to address a municipal concern. That is, does the law go beyond what is reasonably necessary for the achievement of the legitimate object sought to be attained, that is the alleged dumping, graffiti and vandalism? Included in that assessment would be a consideration of any adverse consequences that arise, such as potential losses to the charities concerned arising out of the ban.
- *Fettering of discretion*: an authority will be acting unreasonably where it refuses to hear applications or makes certain decisions without taking

individual circumstances into account by reference to a certain policy. When an authority is given discretion, it cannot bind itself as to the way in which this discretion will be exercised either by internal policies or obligations to others. Even though an authority may establish internal guidelines, it should be prepared to make exceptions on the basis of every individual case.

Thus, generally, if a public body is empowered to make decisions, based on applications, then it should consider each individual application on its merits, in this case being the decision on an application by an individual charity to place a collection bin on public land. A general overall policy may be operated, but should not admit of no exceptions, otherwise it risks being unlawful.

- *Legitimate expectation*: the charities mentioned above might complain that their rights and interests have been adversely affected (Committee Term of Reference 10.6(b)) in that, following past conduct, they had a legitimate expectation of having permits renewed upon expiry, because they had always been renewed in the past, and no material circumstances had changed.

2.24 The Committee is not a court of law, and it is limited to considering instruments under its Terms of Reference, the Committee being free to interpret those Terms of Reference as it sees fit. In considering whether instruments are ‘within power’, the Committee is entitled to take those public law tests into account and, in doing so, the Committee believes that it is possible that the decision taken by the Council on 16 February 2016 to create a blanket ban on charity collection bins on local government property is an abuse of power, in that the outcome of that decision appeared to:

- be disproportionate to the problem as reported – not all of the locations of the 76 collection bins previously sited had encountered the issues complained of
- fetter the discretion of the City Council, as a public body, to give fair consideration to any applications for a permit under clause 3(1)(t) of the local law, and
- be unreasonable.

2.25 Thus, had the blanket ban appeared in the instrument being scrutinised by the Committee, it is possible that a Notice of Motion to disallow the amending local law might have been moved in the Legislative Council, on the grounds that it was not within power, being beyond what Parliament would have reasonably contemplated when delegating the power to make local laws to local governments (subject to what is said in paragraphs 2.29 to 2.33 below). However, as these considerations applied to

the Council's determination and not the amending law under scrutiny, the Committee conceded that they were matters for the courts to adjudicate upon, if asked, and were outside of the Committee's Terms of Reference.

Term of Reference 10.6(c) — Provision of an effective mechanism for the review of administrative decisions?

- 2.26 Under Committee Term of Reference 10.6(c), the Committee may consider whether an instrument provides an effective mechanism for the review of administrative decisions. It might be said that this amendment to the Principal Local Law does the opposite, in the case of applicants wishing to place and maintain a charity collection bin on local government property. By withdrawing the right to apply for a permit under clause 3.1(1)(t) of the Principal Local Law, it would appear, it also took away a person's right to seek a review of any refusal of the application under Division 1 of Part 9 of the Act.
- 2.27 However, because there was no longer a right to apply for a permit, there was no longer a concomitant right to seek a review of a decision to refuse such a permit. It was not the effective mechanism for review that was withdrawn by the Amendment Local Law, but the right to apply for a permit in the first place.
- 2.28 The Committee also noted that the Principal Local Law provides no such review mechanisms for similar bans, also to be made by determinations, on activities such as riding a bicycle, using a boat, playing or practicing ball games, etc. Moreover, a legal challenge to the overall ban on placing and maintaining charity collection bins on local government property remains available.

Timing

- 2.29 Finally, the Committee was cognisant of the fact that, should it recommend disallowance of the Amendment Local Law, and the Legislative Council act on that recommendation to disallow it, it would have had no effect on the validity of the determination.
- 2.30 The Amendment Local Law was published in the *Western Australian Government Gazette* on 13 November 2015. By virtue of section 3.14(1) of the Act and clause 1.2 of the instrument, it came into effect 14 days after the day on which it was so published.
- 2.31 Section 42 (2) of the *Interpretation Act 1984* reads:

Notwithstanding any provision in any Act to the contrary, if either House of Parliament passes a resolution disallowing any regulations of which resolution notice has been given within 14 sitting days of such House after such regulations have been laid before it or if any

regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.

2.32 Thus, the Amending Local Law was in force from 27 November 2015, and the determination made following that date was therefore lawfully made. Should the Legislative Council have disallowed the Amendment Local Law, the determination would have remained in force, because such disallowance would have taken place ‘*without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.*’

2.33 The Committee was therefore of the view that any disallowance of the Amendment Local Law would not have affected the validity of the determination in any event.

Committee conclusion

2.34 In conclusion, having taken all of the above matters into account, the Committee took the view that it should not recommend disallowance in respect of the Amendment Local Law.

2.35 The issues regarding the legitimacy of sub-delegations need to be broken down into two separate elements:

- the creation of a power to make determinations (or other types of subdelegation such as ‘policies’ or ‘lists’), and
- the actual exercise of that power to make a determination.

2.36 The Committee only has the right under its terms of reference to influence the former. The next chapter explores the way in which the Committee has done so in the past.

CHAPTER 3

LEGALITY OF DETERMINATION DEVICES

BACKGROUND

- 3.1 Despite the historic support of WALGA and its members, it was long considered by previous Committees that the use of determination devices was likely to be invalid at law as an unauthorised sub-delegation of legislative power. The wording of the primary legislation is a key issue. What seems to be of most importance is whether the empowering Act can be interpreted as permitting such delegation.
- 3.2 The relevant provisions of the Act conferring legislation-making powers on local governments contain no express or implied reference to sub-delegation. As has been said, section 3.4 of the Act provides that the general function of a local government involves both executive and legislative functions. Of the latter, the relevant provisions may be found in the **Appendix 1** to this Report.
- 3.3 The small number of Australian cases that have dealt with this issue makes it difficult to establish clear guidelines. Some relevant Australian authorities on what may be appropriately subdelegated listed are here:
- In *Sambell v Cook*¹⁰, the court held that a sub-delegation of power by the town and country planning board to its chairman to make interim development orders was invalid.
 - In *Turner v Owen*¹¹, the Full Federal Court held that a provision of the *Customs (Prohibited Imports) Regulations 1956* (Cth) which prohibited the importation of goods which were, in the opinion of the Minister, of a dangerous nature, was an unauthorised delegation to the Minister of the power to determine which goods should be prohibited from importation.
 - Wilson J in *Dainford Ltd v Smith*¹², distinguished the case before him (which dealt with the sub-delegation in a private strata development plan of a power to allocate car parking spaces for residents) from the above cases, as it constituted only the ‘*particularisation*’ of a right to identify the owners of the car parking spaces that was given by the primary instrument.

¹⁰ [1962] VR 448.

¹¹ (1990) 96 ALR 119.

¹² (1985) 155 CLR 342 at 356.

- In *R v McLennan; Ex parte Carr*¹³, the High Court held that it was not an unauthorised sub-delegation in circumstances where regulations to prohibit the export of goods contained a provision that no person could export non-ferrous metals without the approval of the Department of Supply and Development. It was held that this provision was consistent with a general prohibition against the export of certain types of metals being established in the subsidiary legislation, but with that prohibition being subject to an administrative discretion on a case by case basis.

3.4 Although not all of these cases refer to the distinction specifically, the trend is that whilst in most instances it is not possible to delegate a legislative power, it is valid to delegate an ‘*administrative function*’. In the leading case of *Carltona Ltd v Commissioner of Works*¹⁴, the principle was established (‘the Carltona principle’) that a public servant may exercise a statutory function on behalf of a Minister. This is commonly referred to as an implied power to authorise or delegate. The decision of the United Kingdom Court of Appeal in that case was based on necessity — Ministers in modern-day governments have so many decisions to make that it is necessary for them to be able to have someone exercise them on their behalf. It seems to be key to that judgment that it was the Minister who remained accountable to parliament, however, not the decision maker.

3.5 The Carltona decision and principle have been adopted into Australian law through cases such as *O’Reilly v State Bank of Victoria Commissioners*¹⁵, where it was held that a power conferred on the Commissioner of Taxation to issue notices to persons to produce books, documents and other items could be exercised by a duly authorised delegate, notwithstanding the fact that no express power to delegate existed in the relevant legislation.

THE COMMITTEE’S APPROACH

3.6 The Committee has, on many occasions, had to consider the effect of determination devices within local laws, and whether they are legitimate instruments of executive decision making or are indeed a form of unlawful or inappropriate sub-delegation.

3.7 The Committee’s historical position on determination devices was set out in 2002 in the then Committee’s Fourth Report, which dealt with an attempt by the City of Perth to extend the use of determination devices to a Code of Conduct Local Law:

¹³ (1952) 86 CLR 46.

¹⁴ [1943] 2 All ER 560.

¹⁵ (1983) 153 CLR 1.

The Local Law uses the device of a “determination” made by Council to put in place the disciplinary action under the Local Law. Determinations first appeared in the Shire of Moora Local Government Property Local Law which has subsequently been adopted by numerous other local governments. Under that local law a local government could make determinations about the use of its property such as local halls, swimming pools, libraries, playgrounds, parks and the like rather than enact separate local laws regulating activities carried out in these places. So, for example, a local government could use the property local law to make a determination specifying that the speed of vehicles on roads in specified local government property is 40kph. Notification that this determination had been made would be included in a schedule to the local law and the full text of the determination made available to the public in a register of determinations available at the Council Office. A speed sign would be erected to that effect on each property as further notification. Under the local law the local government could make numerous determinations in relation to standards of behaviour by members of the public on its property.

Both the Department of Local Government and Regional Development and the former Joint Standing Committee on Delegated Legislation expressed concerns about the use of the determination device in that local law. The use of determinations avoided scrutiny by both the Department and the Parliament in a manner similar to the use of a policy made by simple majority of Council in the City of Perth Code of Conduct Local Law. This was because the procedure for making a local law under section 3.12 of the Local Government Act 1995 was not required to be followed to make, repeal or amend a determination. Also the determination device by-passed the requirements of the Interpretation Act 1984 in relation to publication of the determination in the Government Gazette, tabling in both Houses of Parliament and disallowance. The Department was of the view that the determination device was a back door route to making a local law and was hence unlawful. However a compromise position was adopted to ensure that the local law was required to set out the precise heads of power under which determinations could be made.

Aside from the Department’s concerns and the issue of scrutiny, the former Committee also raised the issue as to whether determinations made under the Shire of Moora Local Government Property Local Law were unlawful as a sub-delegation of legislation making power. The argument raised by Minter Ellison, lawyers representing the then Western Australian Municipal Association [the predecessor of

WALGA], to support the use of determinations in the Shire of Moora Local Government Property Local Law was that because they were administrative in character determinations were not an unlawful sub-delegation of legislative power.

As a result of its concerns with the Shire of Moora Local Government Property Local Law, the then Joint Standing Committee on Delegated Legislation requested and obtained an undertaking from WAMA's Local Government Act Services Committee that the determination concept would not be expanded beyond the current Local Government Property Local Law. The advent of the City of Perth Code of Conduct Local Law extends the use of the determination concept beyond the Local Government Property Local Law to a new and quite unique area. Although the City of Perth cannot be bound by such an undertaking, the current Committee re-affirms the view previously expressed by the Joint Standing Committee on Delegated Legislation that the determination device should be restricted to the Local Government Property Local Law.

In the absence of judicial pronouncement on the validity of the determination device contained in the WALGA's Local Government Property Local Law, the Committee remains concerned that the making of determinations by local governments in relation to their property may be the exercise of legislative rather than administrative power. If this is the case such determinations will be an unlawful sub-delegation of local government law making power.¹⁶

- 3.8 The 'compromise position' mentioned above and agreed to by the Committee, encapsulated in the provision which appeared in the 2003 version of WALGA's model Local Government Property Local Law, was that a determination may be made providing accountability measures were incorporated. That version of the relevant part of the WALGA model appears here:

¹⁶ Western Australia, Legislative Council, Delegated Legislation Committee, Report 4, *City of Perth Code of Conduct Local Law*, 26 September 2002, pp 49-51.

Procedure for making a determination

- 2.2 (1) The local government is to give local public notice of its intention to make a determination.
- (2) The local public notice referred to in subclause (1) is to state that –
- (a) the local government intends to make a determination, the purpose and effect of which is summarised in the notice;
 - (b) a copy of the proposed determination may be inspected and obtained from the offices of the local government; and
 - (c) submissions in writing about the proposed determination may be lodged with the local government within 21 days after the date of publication.
- (3) If no submissions are received in accordance with subclause (2)(c), the Council is to decide to –
- (a) give local public notice that the proposed determination has effect as a determination on and from the date of publication;
 - (b) amend the proposed determination, in which case subclause (5) will apply; or
 - (c) not continue with the proposed determination.
- (4) If submissions are received in accordance with subclause (2)(c) the Council is to –
- (a) consider those submissions; and
 - (b) decide –
 - (i) whether or not to amend the proposed determination; or
 - (ii) not to continue with the proposed determination.
- (5) If the Council decides to amend the proposed determination, it is to give local public notice –
- (a) of the effect of the amendments; and
 - (b) that the proposed determination has effect as a determination on and from the date of publication.
- (6) If the Council decides not to amend the proposed determination, it is to give local public notice that the proposed determination has effect as a determination on and from the date of publication.
- (7) A proposed determination is to have effect as a determination on and from the date of publication of the local public notice referred to in subclauses (3), (5) and (6).
- (8) A decision under subclause (3) or (4) is not to be delegated by the Council.

3.9 The Committee is thus more inclined to exercise a degree of leniency where resolutions and determinations made by a local government are subjected to a degree of public scrutiny. The Committee notes that the procedure for making a

determination in the Principal Local Law (see paragraph 2.6 above) provides for such a degree of public consultation. This is only one factor that the Committee will take into account however.

- 3.10 It may be argued that determination devices should be available to local governments more widely in local laws for purely ‘*administrative*’ matters. As mentioned above, the Act provides local government with both a legislative and executive function. It provides a procedure for the making of local laws, and section 3.18(1) of the Act states that ‘*A local government is to administer its local laws...*’
- 3.11 A decision is generally regarded in law as being administrative in character because it relates to a particular case and there is an absence of wider policy considerations. It is likely that where the matters left to be carried out by a sub-delegate are questions of detail which merely fill the gaps left in the legislation itself, or which are to be carried out in accordance with guidelines laid down in the legislation, the more likely it will be that the courts will determine that the sub-delegate is exercising administrative powers only, and the sub-delegation will be valid. This is the approach with which the Committee concurs.

Provisions in parking and special events local laws

- 3.12 The determination device as a concept is thus not entirely new, and can be viewed as an extension of the long-standing practice in relation to obviously administrative matters. For example, a local law may allow for such things as designated parking bays and permitted parking times to be implemented by a simple council resolution that is made clearly known to the public by way of street signage. For instance, clause 2.1 of the WALGA model *Parking and Parking Facilities Local Law* provides as follows:

Determination of parking stalls and parking stations

- (1) *The local government may by resolution constitute, determine and vary –*
- a) parking stalls;*
 - b) parking stations;*
 - c) permitted time and conditions of parking in parking stalls and parking stations which may vary with the locality;*
 - d) permitted classes of vehicles which may park in parking stalls and parking stations;*
 - e) permitted classes of persons who may park in specified parking stalls or parking stations; and*

f) the manner of parking in parking stalls and parking stations.

(2) Where the local government makes a determination under subsection (1) it shall erect signs to give effect to the determination.

- 3.13 This is consistent with the decision of the Victorian Full Court in *Croft v Rose*¹⁷, where the fixing of speed limit signs and lighting on specified roads was left to the discretion of administrative staff. The court was of the view that the administrative staff were not the law-makers in this instance, as it was simply a case that the law made by the Governor via regulations did not have effect until a further, purely administrative, step was taken by others. It was significant that the administrative staff had no power to specify the particular roads that they were to change the speed limits on, and the speed limits were set by identified criteria.
- 3.14 The Committee has, since 2004, allowed the use of clauses in parking local laws that establish (usually by way of a schedule) areas that may be designated as ‘parking stations’ or ‘no parking areas’, with the details of specific parking bays and days and times to which parking restrictions apply to be determined by the local government and adequately signposted at those parking bays. The Committee has basically taken the view that the designation of individual parking bays is a purely administrative matter and that, so long as any restriction is adequately sign-posted, it will not object to determination devices being used sparingly in parking local laws.
- 3.15 Similarly, special events local laws have been allowed to use determination devices to establish no-parking zones over entire suburbs, but only where a procedure is followed where the no parking areas are publicised before the event and adequately sign-posted during the event. The use of determination devices in a special events local law was accepted by the Committee as necessary due to the very small timeframe in which local governments have to implement the no parking zones — usually only knowing a few weeks before an event exactly when and where it will be held and the restrictions that are to apply. This was accepted by the Committee as too short a time period in which to effectively enact a local law amendment. The Committee’s insistence on sufficient public notice for the closure of a large number of parking spaces is consistent with the requirements of public notice that local governments must follow when closing individual thoroughfares to vehicles under section 3.50 of the Act.
- 3.16 Though debateable, this approach of the Committee was probably also consistent with the comments of Isaacs J in *Melbourne Corporation v Barry*¹⁸, where he commented that a Council empowered by an instrument of subsidiary legislation to ‘regulate’ a procession could not exercise its administrative powers to outright prohibit

¹⁷ [1957] ALR 148.

¹⁸ (1922) 31 CLR 174.

processions, but could nonetheless deal with matters such as the most suitable route for the procession, the days or hours when the procession was held, and any steps necessary to prevent interference with the procession.¹⁹

3.17 The Committee therefore remains of the view that, given that:

- clause 2.2 of the WALGA model *Local Government Property Local Law* provides a procedure for making a determination which ensures that the local government adequately consults the public when proposing to make or amend a determination, and
- clause 2.5 of that model local law obliges local governments to keep a register of the determinations that they make, and to provide the public with a copy of that register upon request,

then the making of a local law adopting this type of model is acceptable.

3.18 The Committee is also of the view that purely administrative matters that may change on a regular basis are amenable to such a determination device, particularly where the delegated legislation in question sets out guidelines as to how the administrative function is to be undertaken.

3.19 The Committee notes, however, that a future Committee is not bound by this or any other resolution of this Committee.

MORE RECENT EXAMPLES

3.20 As has been seen, the Committee had taken the view that only determination devices as framed in the WALGA model local laws would be permitted in local government property local laws, and only to the extent that they reflected the detailed WALGA model provisions with their publication and consultation requirements.

3.21 In more recent times, the Committee has been willing to recognise other forms of sub-delegation devices when, in purely practical administrative terms, it made sense to do so.

Permissible verges

3.22 A common provision in local government thoroughfares and/or public property local laws is that an owner or occupier of land which abuts on a verge may on that part of the verge directly in front of her or his land install a permissible verge treatment, including the installation of an ‘*acceptable material*.’

¹⁹ Ibid, p 199.

3.23 In 2009, the City of Stirling made a law under which a permissible verge treatment (from the City of Stirling’s point of view) included:

the installation of an acceptable material or other verge treatment as determined by the City under a policy.

3.24 Clearly, this wording creates a sub-delegation (in the sense that ‘a policy’ is not required to be made by full Council meeting — policies or determinations such as this are made by a simple majority of Council members, whereas local laws must be made by an absolute majority under section 3.12(4) of the *Local Government Act 1995*). Nor is it subject to a requirement for gazettal or parliamentary scrutiny.

3.25 When the then Committee scrutinised that City of Stirling law, it was of the view that the clause was not authorised by the Act and was invalid. In this instance, there was no provision for advertising the Council’s intention to make the policy nor was there any scope for receiving public submissions ahead of any policy being formulated.

3.26 The Committee thus sought and obtained an undertaking to amend the law to delete the words ‘*or other verge treatment as determined by the City under a policy.*’ The amendment was made by the *City of Stirling Repeal and Amendment Local Law 2011*, and the law in force today has no mention of a policy.

3.27 The matter arose again in 2015, when the Shire of Trayning made its *Public Places and Local Government Property Local Law 2015*. At the time, the equivalent WALGA model provisions allowed for ‘*acceptable materials*’ to be defined in a ‘*policy*’, a document which could be produced by the Chief Executive Officer (CEO) of the local government where:

- a draft of the policy had to be advertised for two consecutive weeks in a local newspaper
- 21 days had to be allowed for public responses, which had to be taken into consideration, and
- in the event of adoption, the policy had to be published again in the same newspaper.

3.28 As can be seen, this provision is not far removed from that accepted by the Committee in 2003 (paragraph 3.8 above), except in this case it is the CEO that creates the policy initially rather than the Council members. In the event, the Committee sought and obtained undertakings that the Shire of Trayning would amend its local law by inserting provisions whereby any policy which set out acceptable verge treatments must be made in accordance with those model WALGA provisions set out above. The appropriate amendment was made by the Shire of Trayning in its *Local Government Property and Public Places Amendment Local Law 2015*.

Waste

- 3.29 The Committee's *Report 77 — Inquiry into a Proposed Template Local Law* followed an inquiry under the Committee's Term of Reference 10.7(a), that is:

to inquire into and report on —

*any proposed or existing template, pro forma or model local law.*²⁰

- 3.30 This followed the Committee's Report 46, dated November 2011, in which the Committee recommended disallowance of the *City of Gosnells Waste Local Law 2011* and the *Shire of Derby/West Kimberley Waste Services Local Law 2011*.²¹ The Committee considered certain clauses of those local laws to be disallowable as falling outside the contemplation of the Parliament in authorising the making of delegated legislation. Specifically, the Committee took the view that a number of offence provisions in the local laws were too prescriptive and criminalised behaviour that was not obnoxious or hazardous in any way.²²
- 3.31 The *City of Gosnells Waste Local Law 2011* and the *Shire of Derby/West Kimberley Waste Services Local Law 2011* were disallowed by the Legislative Council on a motion proposed by the Committee, and subsequently a proposed template Waste Local Law was the culmination of a drafting process commenced by WALGA following that disallowance.
- 3.32 In that template Waste Local Law (see Appendix 1 to Committee Report 77), determination devices are permitted in respect of the acceptable weight of the contents of rubbish bins and recycling bins, the placement by occupiers of homes of those bins, the location of waste disposal sites and the classification of waste that may be deposited at a local waste facility. These are similar types of activity to the one being provided for by the City of Joondalup's Amendment Local Law.
- 3.33 Clause 1.6 of the template Waste Local Law reads:

Local public notice of determinations

Where, under this local law, the local government has a power to determine a matter —

²⁰ Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 77, *Inquiry into a proposed template waste local law*, November 2014.

²¹ Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 46, *City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011*, November 2011.

²² *Ibid*, p 18.

- a) local public notice, under section 1.7 of the LG [Local Government] Act, must be given of the matter determined;*
- b) the determination becomes effective only after local public notice has been given;*
- c) the determination remains in force for the period of one year after the date that local public notice has been given under paragraph (a);*
- d) after the period referred to in paragraph (c), the determination continues in force only if, and for so long as, it is the subject of local public notice, given annually, under section 1.7 of the LG Act.*

3.34 Again, the use of determination devices in these instances may be administratively sensible, is subject to a measure of local scrutiny and is acceptable as a legitimate delegation of an administrative function rather than a legislative one.

3.35 However, as with the determination made under the Principal Local Law which is the subject of this Report, the Committee is unable to influence how the exercise of the appropriate head of power to make a determination is carried out.

CHAPTER 4

CONCLUSION, FINDING AND RECOMMENDATION

CONCLUSION

- 4.1 Local governments play a vital role in providing ‘*good government*’ for the persons in their districts, as they are mandated to do by the Act. One of the ways in which they are able to ensure such good government is through the exercise of their legislative function in the public interest, that is through the making of local laws covering all manner of subjects including local health issues, the responsible keeping of pets and, of course, the permitted use of local government public property.
- 4.2 Underlying that legislative function is local governments’ executive function, or the day to day administration of the local government and the way it carries out its duty of good government in the interests of its local residents. This includes the way in which the local laws are both administered and enforced.
- 4.3 The role of this Committee in scrutinising local laws, under its duties set out in Schedule 1 to the Legislative Council’s Standing Orders, and following the tabling of legislative instruments under the *Interpretation Act 1984*, is to ensure the legitimacy of the instrument as against certain parameters, being:
- whether the instrument is lawful (including whether its provisions are reasonable and appropriate)
 - whether the instrument will have an adverse effect on a person’s existing rights
 - whether it provides an effective mechanism for review of decisions, and
 - whether it contains provisions more suited to other forms of legislation (see the hierarchy of instruments at paragraph 2 of the Executive Summary).
- 4.4 In the present case, the Principal Local Law already contained provision for the making of determinations by the City Council outlawing activities that may cause nuisance to local residents. The legitimacy of that determination - making provision had been confirmed previously as meeting the Committee’s own tests — it provided for the making of administrative decisions for the good governance of the district, following a consultation process involving the public, and it mandated the recording of any determinations made in a publicly accessible register.
- 4.5 The Amendment Local Law that came before the Committee in February 2016 extended the list of activities which may be prohibited by the City Council where they

are causing a nuisance. It was the later exercise by the City of that power to make such a determination that was objectionable to the Committee.

Finding: The Committee finds that, whilst it has a duty to ensure that any sub-delegation contained in delegated legislation is lawful, reasonable and appropriate, it has no authority over the actual exercise of that sub-delegated power.

- 4.6 As mentioned previously, the Committee was and remains deeply concerned about the way in which the City has exercised its power to make this determination device. The Committee had no locus in adjudicating upon the decision to issue a blanket ban on the placement and maintenance of charity collection bins which, as has been said, the Committee felt to be potentially:
- disproportionate to the problem as reported — not all of the locations of the 76 collection bins previously sited had encountered the issues complained of
 - inappropriately fettering the discretion of the City Council, as a public body, to give fair consideration to any applications for a permit under clause 3(1)(t) of the local law, and
 - unreasonable. Can a blanket ban on an otherwise legitimate and largely uncontroversial activity be described as ‘good government’?
- 4.7 Moreover, as set out in paragraphs 2.29 to 2.33 above, the Committee found that it was powerless to act in any event as, even if it had recommended disallowance, and the Legislative Council had voted in accordance with that recommendation, the determination would still have remained in force.
- 4.8 The procedure for challenging the legitimacy of delegated decisions taken by local governments (or any other public body) is by way of judicial review in the courts. This though is a highly technical and expensive exercise for anyone who feels wronged by such a decision and, ideally, a mechanism might be found by which the making of potentially wrongful decisions could be prevented.
- 4.9 This would inevitably involve the Department of Local Government and Communities (the Department), which supports the Western Australian local government sector in the provision of good governance and compliance by monitoring, promoting and enforcing compliance with legislation.
- 4.10 Whilst it is difficult to envisage a form of legislative regulation of local government by which activities are measured against some overall objective standard of what is reasonable or proportionate, for example, the Committee would ask the Department to consider approaches by which the same or a similar outcome might be achieved. This might be by way of:

- an amendment to the Act which provides that no local law may be made which has the effect of denying an affected person the right to apply for a permit or licence to do or carry out any lawful activity on local government property, together with
- an amendment to Part 9 of the Act whereby no affected person may be deprived of the right to exercise his or her statutory right to seek a review of a decision to deny such a permit or licence.

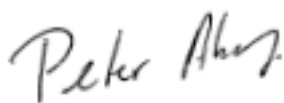
4.11 Alternatively, the Department might consider exercising powers under section 3.5 of the Act to the same effect. The relevant part of that section reads:

(4) Regulations may set out —

(a) matters about which, or purposes for which, local laws are not to be made; or

(b) kinds of local laws that are not to be made, and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind.

Recommendation: The Committee recommends that the Minister for Local Government and Communities investigates administrative or legislative measures whereby local governments that exercise powers to make determinations that may impact on the existing rights of groups or individuals must act reasonably in all circumstances and ensure that a means exists whereby such determinations may be reviewed.



Mr Peter Abetz MLA
Chairman

8 September 2016

APPENDIX 1

EXTRACT FROM *LOCAL GOVERNMENT ACT 1995*

Division 2 — Legislative functions of local governments

Subdivision 1 — Local laws made under this Act

3.5. Legislative power of local governments

- (1) 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 under this Act.
- (2) A local law made under this Act does not apply outside the local government's district unless it is made to apply outside the district under section 3.6.
- (3) The power conferred on a local government by subsection (1) is in addition to any power to make local laws conferred on it by any other Act.
- (4A) Nothing in the *Building Act 2011* prevents a local government from making local laws under this Act about building work, demolition work, a standard for the construction or demolition of buildings or incidental structures, or the use and maintenance of, and requirements in relation to, existing buildings or incidental structures, as those terms are defined in section 3 of that Act.
- (4) Regulations may set out —
 - (a) matters about which, or purposes for which, local laws are not to be made; or
 - (b) kinds of local laws that are not to be made,and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind.
- (5) Regulations may set out such transitional arrangements as are necessary or convenient to deal with a local law ceasing to have effect because the power to make it has been removed by regulations under subsection (4).

[Section 3.5 amended by No. 64 of 1998 s. 5; No. 24 of 2011 s. 166(2).]

3.6. Places outside district

- (1) If the Governor's approval has been first obtained, a local government may make a local law under this Act that applies outside its district.

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- (2) A local government cannot, under subsection (1), make a local law that applies to —
 - (a) a part of the State that is in the district of another local government; or
 - (b) a part of the State to which a local law made by another local government concerning the same subject matter applies under this section.
 - (3) The Governor may revoke any approval given under subsection (1) and, after that revocation, a local law made under the approval ceases to apply to the part of the State for which the approval was given.
 - (4) The Minister is to cause notice of any revocation under subsection (3) to be published in the *Gazette*.

3.7. Inconsistency with written laws

A local law made under this Act is inoperative to the extent that it is inconsistent with this Act or any other written law.

3.8. Local laws may adopt codes etc.

- (1) A local law made under this Act may adopt the text of —
 - (a) any model local law, or amendment to it, published under section 3.9; or
 - (b) a local law of any other local government; or
 - (c) any code, rules, specifications, or standard issued by Standards Australia or by such other body as is specified in the local law.
- (2) The text may be adopted —
 - (a) wholly or in part; or
 - (b) as modified by the local law; or
 - (c) as it exists at a particular date or, except if the text of a model local law is being adopted, as amended from time to time.
- (3) The adoption may be direct, by reference made in the local law, or indirect, by reference made in any text that is itself directly or indirectly adopted.

[Section 3.8 amended by No. 74 of 2003 s. 79.]

3.9. Model local laws

- (1) The Governor may cause to be prepared and published in the *Gazette* model local laws the provisions of which a local law made under this Act may adopt by reference, with or without modifications.
- (2) Model local laws have no effect except to the extent that they are adopted.
- (3) The Governor may, by notice published in the *Gazette*, amend a model local law published under this section.

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- (4) An amendment of a model local law does not affect any local law that adopted the model local law before the amendment but the amendment may be adopted by a further local law.

3.10. Creating offences and prescribing penalties

- (1) A local law made under this Act may provide that contravention of a provision of the local law is an offence, and may provide for the offence to be punishable on conviction by a penalty not exceeding a fine of \$5 000.
- (2) If the offence is of a continuing nature, the local law may make the person liable to a further penalty not exceeding a fine of \$500 in respect of each day or part of a day during which the offence has continued.
- (3) The local law may provide for the imposition of a minimum penalty for the offence.
- (4) The level of the penalty may be related to —
- (a) the circumstances or extent of the offence;
 - (b) whether the offender has committed previous offences and, if so, the number of previous offences that the offender has committed.

[(5) deleted]

- (6) A local law made under this Act may specify the method and the means by which any fines imposed are to be paid and collected, or recovered.

[Section 3.10 amended by No. 1 of 1998 s. 7.]

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.
- (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; 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) 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; and
 - (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.

[Section 3.12 amended by No. 1 of 1998 s. 8; No. 64 of 1998 s. 6; No. 49 of 2004 s. 16(4) and 23.]

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 by 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 determine whether or not it considers that it should be repealed or amended.
- (2) The local government is to give Statewide public notice stating that —
 - (a) the local government proposes to review the local law; and
 - (b) a copy of the local law may be inspected or obtained at any place specified in the notice; and
 - (c) submissions about the 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.
- (2a) A notice under subsection (2) is also to be published and exhibited as if it were a local public notice.
- (3) After the last day for submissions, the local government is to consider any submissions made and cause a report of the review to be prepared and submitted to its council.
- (4) When its council has considered the report, the local government may determine* whether or not it considers that the local law should be repealed or amended.

* *Absolute majority required.*

[Section 3.16 amended by No. 64 of 1998 s. 7; No. 49 of 2004 s. 24.]

3.17. Governor may amend or repeal local laws

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

- (2) Subsection (1) does not include the power to amend a local law to include in it any provision that bears no reasonable relationship to the local law as in force before the amendment.
- (3) The Minister is to give a local government notice in writing of any local law that the Governor makes to amend the text of, or repeal, any of the local government's local laws.
- (4) Section 5.94 applies as if a local law made under this section by the Governor were a local law made by the local government in accordance with section 3.12.