



THIRTY-NINTH PARLIAMENT

REPORT 86

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

SHIRE OF KELLERBERRIN DOGS LOCAL LAW 2015

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

August 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

Hon Mark Lewis MLC

Ms Simone McGurk MLA

Mr Paul Papalia MLA

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Government Response

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

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or 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 AND RECOMMENDATIONS FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
SHIRE OF KELLERBERRIN DOGS LOCAL LAW 2015

EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (Committee) is of the view that the Shire of Kellerberrin (Shire) did not follow the mandatory, sequential procedure set out in section 3.12 of the *Local Government Act 1995* (Act) when it made the *Shire of Kellerberrin Dogs Local Law 2015*.
- 2 The procedure includes a requirement, under section 3.12(3)(b), to provide the Minister for Local Government and Communities with copies of the proposed local law and its Statewide public notice.
- 3 This requirement was not met in the course of making the *Shire of Kellerberrin Dogs Local Law 2015*.
- 4 Being invalidly made, the local law offends Committee term of reference 10.6(a) in that it is not within power of the empowering enactment.
- 5 The Committee is of the view that the Shire requires assistance from the Department of Local Government and Communities with the procedures for making local laws.

RECOMMENDATIONS

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Recommendation 1: The Committee recommends that the *Shire of Kellerberrin Dogs Local Law 2015* be disallowed.

Recommendation 2: The Committee recommends that the Minister for Local Government again investigate the ongoing capacity of the Shire of Kellerberrin to make local laws and provide additional assistance to the Shire regarding the procedure for making local laws.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

SHIRE OF KELLERBERRIN DOGS LOCAL LAW 2015

1 REFERENCE AND PROCEDURE

- 1.1 On 19 January 2016, the Shire of Kellerberrin (Shire) gazetted the *Shire of Kellerberrin Dogs Local Law 2015* (the local law).
- 1.2 Upon gazettal, the local law stood referred to the Joint Standing Committee on Delegated Legislation (Committee). Once the local law was tabled in the Parliament, it became an instrument subject to disallowance.

2 BACKGROUND

- 2.1 The local law arose from undertakings provided by the Shire to the Committee on 20 June 2013 to amend the *Shire of Kellerberrin Dog Local Law 2012*.
- 2.2 Clause 5 of the *Shire of Kellerberrin Dog Local Law 2012* prohibited dogs from certain public places, with no exception to allow for assistance animals as defined in the *Disability Discrimination Act 1992 (Cth)*.
- 2.3 In relation to the *Shire of Kellerberrin Dog Local Law 2012*, the Shire undertook to:
- amend clause 5 to insert an exception to the ban on dogs in public places for people entering a public place accompanied by an assistance animal as defined in section 9(2) of the *Disability Discrimination Act 1992 (Cth)*
 - amend clause 5.1(1)(c) to refer to the correct legislation and delete the reference to the repealed *Health (Food Hygiene) Regulations 1993*
 - make the necessary consequential amendments.
- 2.4 The local law purports to repeal the *Shire of Kellerberrin Dog Local Law 2012* and enact a new dogs local law.

3 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW AND NON-COMPLIANCE WITH THE *LOCAL GOVERNMENT ACT 1995*

- 3.1 The Explanatory Memorandum to the local law revealed non-compliance with the procedure for making a local law set out in section 3.12 of the *Local Government Act 1995* (Act).

3.2 Section 3.12(1) of the Act provides that in making a local law, a local government is to follow the procedure described in section 3.12, in the sequence in which it is described.

3.3 The Committee's position on the status of local laws arising from non-compliance with the procedure in section 3.12 is well established and documented in previous reports.¹ The procedure described there is both mandatory and sequential. A local law which does not follow that procedure in the sequence in which it is described is invalid.

3.4 The Committee notes that clause 5 of the Local Government Legislation Amendment Bill 2014, which is currently before the Parliament, proposes to insert a new subsection (2A) into section 3.12 of the Act as follows:

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

3.5 In any event, for the reasons set out below, in this case the Shire did not substantially comply with the provisions of section 3.12 of the Act.

4 PROCEDURAL SCRUTINY OF THE LOCAL LAW

4.1 Section 3.12(3)(b) of the Act required the Shire to give the Minister for Local Government (Minister) copies of the proposed local law and its Statewide public notices *as soon as* Statewide public notice of the local law had been given.

4.2 The Shire was then empowered, after the specified last day for submissions, to make a local law not significantly different from the proposed local law.

4.3 The relevant parts of the procedure in the making of this local law were as follows:

- Statewide public notice of the local law was given in *The West Australian* on 29 January 2014.
- The Shire adopted the local law at its Council meeting on 17 February 2015.

¹ For example, Parliament of Western Australia, 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 2011; Joint Standing Committee on Delegated Legislation, Report 45, *Shire of Kellerberrin Dogs Local Law*, 3 November 2011; Joint Standing Committee on Delegated Legislation, Report 72, *Shire of Shark Bay Local Government Property Amendment Local Law 2014* and Joint Standing Committee on Delegated Legislation, Report 80, *Shire of Kellerberrin: Cemeteries Local Law 2014; Activities in Thoroughfares and Public Places Local Law 2014; Local Government (Council Meetings) Local Law 2014* and *Fencing Local Law 2014*, 12 March 2015.

- According to the Shire’s Explanatory Memorandum, a copy of the proposed local law was sent to the Minister on 9 March 2015.
 - The local law was gazetted on 19 January 2016.
- 4.4 In relation to the third dot-point, it should be noted that the Department of Local Government and Communities (Department) advised the Committee that it first received notice of the local law on 5 February 2016, following gazettal of the local law.
- 4.5 The requirement in section 3.12(3)(b) of the Act is mandatory and must be completed in sequence between the giving of Statewide public notice under section 3.12(3)(a) and the making of the local law under section 3.12(4). As the step required by section 3.12(3)(b) was not completed in order, the local law is invalid.
- 4.6 In those circumstances, the Committee is of the view that there are a number of benefits identified with the disallowance of invalid instruments, which include ensuring that such laws are quickly removed from the public record and reducing the risk of public misinformation.

5 HISTORY OF DISALLOWANCE OF OTHER LOCAL LAWS MADE BY THE SHIRE OF KELLERBERRIN

- 5.1 On 12 March 2015, the Committee tabled its Report 80, recommending disallowance of the following four local laws made by the Shire:
- *Cemeteries Local Law 2014*
 - *Activities on Thoroughfares and Trading in Thoroughfares and Public Places Local Law 2014*
 - *Local Government (Council Meetings) Local Law 2014*
 - *Fencing Local Law 2014.*²
- 5.2 The basis for the Committee’s recommendation was that the Shire had not complied with the mandatory sequential procedure in section 3.12 of the Act, specifically:
- The requirement in section 3.12(3)(b) to give the Minister copies of the four proposed local laws and their Statewide public notices *as soon as* the Statewide public notice had been given. The Shire entirely omitted this step.

² Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 80, *Shire of Kellerberrin: Cemeteries Local Law 2014; Activities in Thoroughfares and Public Places Local Law 2014; Local Government (Council Meetings) Local Law 2014 and Fencing Local Law 2014*, 12 March 2015.

- The requirement in section 3.12(6) at the end of the sequence giving local public notice of the four gazetted local laws stating their titles; summarizing their purpose and effect; specifying the day on which they would come into operation; and advising that copies may be inspected or obtained from the Shire's office local government's office.
- 5.3 The Legislative Council disallowed those local laws on 13 May 2015.
- 5.4 The Committee notes that the Shire made the same omission in relation to the requirement in section 3.12(3)(b) in respect of this local law.
- 5.5 The Department advised the Committee on 16 March 2016 that it is now working with the Shire to increase its compliance with section 3.12 of the Act in the making of local laws.

6 THE IMPORTANCE OF THE PROCEDURE IN SECTION 3.12 OF THE ACT

- 6.1 The requirement in section 3.12(3)(b) to give the Minister copies of the proposed local law is a critical step in the making of a local law. The section allows the Minister to intervene at an early stage to give advice on both the substance of a proposed local law and any structural or drafting defects. It provides the Minister with an oversight role and alerts the Minister to the breadth of the use of section 3.5(1) of the Act by all local governments.³
- 6.2 This is the fourth occasion since 2011 the Committee has reported to the House concerning various problems the Shire has experienced with following the procedure for making a local law. The first was with the *Shire of Kellerberrin Dogs Local Law 2011* in Report 45, tabled 3 November 2011.⁴ The second was the *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011* in Report 47 tabled 3 May 2012.⁵ The third was Report 80 tabled 12 March 2015, regarding the four local laws referred to in section 5 of this Report.
- 6.3 This repetitive inability to make local laws following the procedure set out in section 3.12 of the Act is the reason for the Committee's recommendation 2.

³ Section 3.5 is titled '*Legislative power of local governments*'. Section 3.5(1) 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.*'

⁴ In that Report, the Shire failed to correctly follow several steps as set out in section 3.12 of the Act. The former Committee recommended that the Executive Council advise the Governor to invoke section 3.17 of the *Local Government Act 1995* to repeal the *Shire of Kellerberrin Dogs Local Law*.

⁵ In that Report, the Committee noted that the Shire had not complied with sections 3.12(5) and (6) of the Act.

7 AMENDMENTS TO THE *DOG REGULATIONS 2013*

7.1 The *Dog Amendment Act 2013* made various amendments to the *Dog Act 1976* including:

- Expansion of the special provisions for Guide dogs in order to recognise and accommodate the various new types of appropriately trained assistance dogs now commonly used by people with a disability.
- Deletion of the power of local governments to make local laws establishing areas where dogs are prohibited, and conferring on local governments a new power to establish such areas by absolute majority after giving at least 28 days' notice of intention to do so.

7.2 Following these amendments, on 20 May 2014 the Governor made amendments to the *Dog Regulations 2013* to provide that a 'place control provision' in a dog local law made under section 51(b), (ba) or (bb)⁶ before 1 November 2013 (the day on which section 51(b), (ba) and (bb) were deleted by the *Dog Amendment Act 2013*), has no effect after 31 July 2014.

7.3 As a result of these amendments, Clause 5 of the *Shire of Kellerberrin Dog Local Law 2012*, the original problematic clause which led to the making of this local law, was therefore rendered of no effect after 31 July 2014.

8 CONCLUSIONS

8.1 The Committee's term of reference 10.6(a) states:

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

(a) *is within power ...*

8.2 As discussed above, the local law is invalid for reasons of non-compliance with sections 3.12(3)(b) of the Act. It also offends the Committee's term of reference 10.6(a). The Committee therefore recommends to the Legislative Council that the local law be disallowed.

⁶ Section 51(b), (ba) and (bb) of the *Dog Act 1976* provided prior to 1 November 2013 that a local government could make local laws '...(b) specifying places where dogs are prohibited absolutely; (ba) extending the operation of section 31, with all necessary modifications, to specified public places or classes of public places that are outside the metropolitan region or a townsite; (bb) specifying any public place or class of public place, being a place that under the care, control and management of the local government, as a dog exercise area for the purposes of section 31 and 32;...'

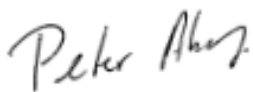
- 8.3 There are a number of benefits in recommending the disallowance of invalid instruments, including ensuring that they are quickly removed from the public record thereby reducing the risk of public misinformation.
- 8.4 Should the Legislative Council disallow the local law, any local law being repealed by it, namely the *Shire of Kellerberrin Dog Local Law 2012*, will automatically revive.
- 8.5 Notwithstanding this revival, the Committee notes that as a result of amendments to the *Dog Regulations 2013* on 20 May 2014, the original problematic clause, clause 5 of the *Shire of Kellerberrin Dog Local Law 2012*, was rendered of no effect after 31 July 2014.

9 RECOMMENDATIONS

- 9.1 The Committee makes the following recommendations.

Recommendation 1: The Committee recommends that the *Shire of Kellerberrin Dogs Local Law 2015* be disallowed.

Recommendation 2: The Committee recommends that the Minister for Local Government again investigate the ongoing capacity of the Shire of Kellerberrin to make local laws and provide additional assistance to the Shire regarding the procedure for making local laws.



**Mr Peter Abetz MLA
Chairman**

18 August 2016