PARLIAMENT OF WESTERN AUSTRALIA

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

A Guide to "Local Laws" under the *Local Government Act 1995* as "Subsidiary Legislation" under the *Interpretation Act 1984*

Presented by the Hon Bruce Donaldson MLC (Chairman)

September 1996

Joint Standing Committee on Delegated Legislation

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Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

(a) *appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*

(b) *unduly trespasses on established rights, freedoms or liberties;*

(c) *contains matter which ought properly to be dealt with by an Act of Parliament;*

(d) *unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

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Preface

This is an important document. It should be read by all local government officers responsible for preparing local laws. It will tell you how local laws are scrutinised by Parliament and what procedures you must follow to satisfy Parliament's requirements.

You should start by reading the **Summary** on page v and the **Check List of Procedures Regarding Explanatory Memoranda** on page vii. This will give you a simple overview of the procedures that local governments must follow in respect of Parliamentary scrutiny of local laws.

Section 4 headed "Local Laws under the *Local Government Act 1995*" (from page 11) contains more detailed information on, and examples of, the procedures which must be followed by local governments in respect of Parliamentary scrutiny of local laws. These are the details of the procedures you must follow.

Sections 1, 2 and 3 contain historical, background and technical information about Parliamentary scrutiny of local laws. They explain why local laws must be scrutinised by Parliament and how they fit into the legislative scheme of the State.

Contents

Summary

1. This document is a guide to **Parliamentary scrutiny** of **local laws** made under the ***Local Government Act 1995***.

2. **Local governments** are **created under legislation** made by Parliament.

3. **Local laws** are legislation made by local governments under **a delegation of power** from Parliament. They are therefore subject to **Parliamentary scrutiny**.

4. **Local laws** are also **subsidiary legislation** under the *Interpretation Act 1984*. This means that local governments must follow certain procedures after making local laws.

5. **Parliament** may **disallow** local laws in certain circumstances. If Parliament disallows local laws, they will be of **no force or effect**.

6. In making local laws, local governments must comply with the **procedures** made by Parliament to enable it to **scrutinise** local laws. These procedures are in addition to the requirements for **making** local laws set out in the *Local Government Act 1995*.

7. When a local government has made a local law, it must **publish** the local law in the ***Western Australian Government Gazette***.

8. Within **6 Parliamentary sitting days** (days on which Parliament actually sits), local laws must be **tabled** in Parliament. This usually will be done by **Parliamentary Counsel**.

9. Immediately after local laws are *Gazetted*, local governments must **send 10 copies** of them, and of an **explanatory memorandum** (EM) in respect of them, to the **Joint Standing Committee on Delegated Legislation**. After tabling, this is the most important procedural requirement made by Parliament in respect of the scrutiny of local laws.

10. The **Committee scrutinises** local laws on behalf of the Parliament.

11. Local governments must **comply with requests for information** made by the Committee.

12. A **flowchart** setting out a typical process of the making of a local law is attached as Appendix 1B. This is a simple diagram setting out the anticipated process for making most local laws.

13. If you have any **questions** about any of the matters in this document, do not hesitate to contact the Advisory/Research Officer to the Committee on 222 7300.

Check List of Procedures Regarding Explanatory Memoranda (EM)

1. A local government makes a local law under procedures in the *Local Government Act 1995*.

2. **Before *Gazettal*** of the local law, but after the text of the local law is finalised, the local government prepares an EM for the Committee. The EM must contain:

   a. the name of the local government;

   b. the title of the local law;

   c. identification of the section(s) of the statute(s) under which the local law is made;

   d. a description of the purpose and effect of, and justification for, the local law (or any amendments to or repeals of it);

   e. identification of any unusual or controversial provisions;

   f. details of consultations undertaken (including details of the Statewide public notice given and copies of submissions received and the local government's response to the submissions);

   g. reasons justifying any change in fees, charges or penalties, and details of the amount of the fee, charge or penalty before the change;

   h. a disclaimer to the effect that the EM is only an aid to understanding and must not be substituted for the local law *Gazetted*, or made available to the public in any way;

   i. the name and telephone number of a person whom the Committee may contact if it has any questions regarding the local law; AND

   j. be signed by the Chief Executive Officer and the Mayor or President of the local government.

3. If the local law adopts a model local law, the EM should contain the title and *Gazettal* date of the model local law. The other information required to be contained in an EM need only be provided in respect of any variations to the model local law.

4. Immediately after *Gazettal* of the local law (or, in the case of local governments distant from Perth, when the final draft local law is sent to the *Gazette*), the local government must send **ten copies** of each of the *Gazetted* (or final draft) local law and its EM **and**, if the local law adopts a model local law, one copy of the model local law, to:

   Advisory/Research Officer
   Joint Standing Committee on Delegated Legislation
   Legislative Council
   Parliament House
   PERTH WA 6000

Joint Standing Committee on
Delegated Legislation

A Guide to "Local Laws" under the *Local Government Act 1995* as "Subsidiary Legislation" under the *Interpretation Act 1984*

1. Interpretation

a. This document is a guide to the principles of Parliamentary scrutiny of certain types of subordinate legislation, including "local laws" under the *Local Government Act 1995*. It does not contain information about what, how or by whom local laws should be made.

b. In this document, a reference to an "agency" usually includes local governments. Similarly, references to "subordinate legislation", "subsidiary legislation" and "regulations" usually include local laws.

2. Introduction

The place of subordinate[1] legislation in our system of government[2]

a. The system of government in Western Australia is that of a parliamentary democracy based on the rule of law[3]. Modern governmental functions are frequently divided into 3 classes:

   i. legislative - the power to make general rules of conduct (ie the power to make laws);

   ii. executive - the power to put into effect in individual cases the general rules made under the legislative power; and

   iii. judicial - the power to judge, or to resolve disputes.

b. The 3 arms of the system of State government in Western Australia are represented by:

   i. Parliament - the legislature;

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[1] Subordinate legislation is also known as subsidiary, delegated or secondary legislation. The term subordinate legislation is preferred because it is the most accurate descriptor of the material it refers to. The meaning of the term is considered below. Note that the *Interpretation Act 1984* refers to "subsidiary legislation".

[2] A more detailed account of the place of subordinate legislation in our system of government, including consideration of the advantages and disadvantages of its use and the potential for abuse, is set out in the Committee's 16th Report, *The Subordinate Legislation Framework in Western Australia*, November 1995.

[3] In simple terms, the "rule of law" is the idea that law is supreme and replaces arbitrary force. For a more detailed explanation of the rule of law, see Allars, M, *Introduction to Australian Administrative Law*, Butterworths, 1990, pp14 *et seq*.

ii. the Executive Council, also known as the "Cabinet" - the executive; and

iii. the judiciary (in relation to which the Supreme Court is the highest court[4] and the Chief Justice of Western Australia the chief judicial officer[5]).

c. The principal function of Parliament is to make law. Parliament makes laws by enacting statutes or Acts of Parliament (which are also referred to as primary legislation).

d. It has long been established that parliaments may delegate their legislative powers. The earliest example of such a delegation in England occurred in 1385[6]. Legislation that is made under a delegation of power from the legislature is known as subordinate legislation.

e. The term "subordinate legislation" postulates 2 concepts. The first relates to the fact that the legislation is *subordinate* or *delegated*. That is, it is legislation that is made by a body (such as a government department or local government) other than the parliament, under the authority of the parliament. The second concept is that of *legislation*. What is legislation? The English Donoughmore Committee[7] distinguished legislative activity from executive activity on the basis that legislative action constitutes the process of formulating general rules of conduct without reference to particular cases while executive action constitutes the process of performing particular acts which apply general rules to particular cases. Thus subordinate legislation can be said to be general rules of conduct affecting the community at large which have been made by a body expressly authorized so to do by an Act of Parliament[8].

f. It should be kept in mind that subordinate legislation is law, no less so than is primary legislation made by Parliament itself. Members of Parliament are accountable to the people at election time and Parliamentary debates about Bills are a matter of public record. Subordinate legislation often is formally made by the executive government. Practically speaking it is often made by bureaucrats. Whilst most subordinate legislation, like an Act of Parliament, is a matter of public record, the process of making it is, generally speaking, formally invisible to the public. In other words, members of Parliament and the laws made by them are accountable in that members are directly accountable to the people in elections and the record of making legislation, at least in so far as Parliamentary debates are concerned, is available to the public. The reasons for making subordinate legislation and information about the process by which it is made are not readily available to the public. Local laws made by local governments are in a slightly different position because of the public advertisement and consultation procedures that apply to them and because they are

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4 It is, however, possible to appeal from the Supreme Court of Western Australia to the High Court of Australia.

5 *Supreme Court Act 1935*, s 7.

6 Pearce, DC, *Delegated Legislation in Australia and New Zealand*, Butterworths, 1977, p 3.

7 United Kingdom, Committee on Ministers' Powers, *Report*, 1932 Cmd 4060.

8 Pearce 1977, p 1-2.

made by elected representatives. Nevertheless, at present the principal effective means of accountability in respect of general subordinate legislation is its scrutiny by parliamentary committee (and this will continue to apply to local laws).

g. Some mention should be made here of the general legislative hierarchy from a more practical perspective. The legislative hierarchy is ordinarily such that the most important matters are dealt with in the statute, those matters of detail of lesser importance are dealt with by subordinate legislation and the minutiæ (in respect of which the greatest administrative flexibility is needed) are dealt with by administrative rules or policies. In some cases the lines between each of these categories (ie legislation, subordinate legislation and administrative rules) is not clear. However, there are legal principles which can be applied.

h. It is generally accepted that, in the modern democratic state, it would be impossible for Parliament to legislate on all matters requiring legislation. However, it is also generally accepted that it is necessary to recognise the criticisms made of subordinate legislation and take steps to minimise the dangers that it poses. In particular cases of delegation, while it is the case that Parliament has approved subject matter on which subordinate legislation can be made, this does not and should not be assumed to grant to the executive or the administration an unfettered discretion to make whatever subordinate legislation it thinks fit. In the first place, the delegation of the legislative power should be (and sometimes is) specifically confined by enabling legislation, that is, given express jurisdictional limits. The discretion granted for the purposes of making subordinate legislation should be structured or subject to specific procedural requirements. And there must be some means whereby innocent and inadvertent misuse (as well as abuse) of delegated powers can be reviewed and remedied. Consequently, although Parliament does not itself wish to legislate on a relevant subject, it nevertheless is essential that Parliament remain informed about the subordinate legislation that is made and have an opportunity to review it.

How subordinate legislation is made

i. A self-explanatory flowchart of a typical process of making subordinate legislation is attached as Appendix 1A[9]. A self-explanatory flowchart of what is anticipated to be a typical process of making a local law is attached as Appendix 1B.

[9] It should be noted that the flowchart represents a typical process of making regulations required to be made by the Governor and may not represent the process of making, for instance, Ministerial regulations, by-laws or local laws.

Interpretation Act 1984

j. Section 41 of the *Interpretation Act 1984* provides that all "subsidiary legislation"[10] must be published in the *Gazette* and comes into operation on the date of publication (or the day specified in the subsidiary legislation). This reflects a fundamental principle of representative democracy based on the rule of law. The rule of law requires that law must be publicised with sufficient precision. John Locke said:

> For all the power the government has, being only for the good of society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds...[11]

And Lord Reid has said:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.[12]

k. The same principle was referred to in the Committee's 16th Report[13] in the context of discussing accountability and means of preventing abuse of delegated legislative powers and in its 17th Report[14] in the context of certain subordinate legislation that was not published in the *Gazette* as required.

l. Following publication in the *Gazette*, all "regulations" (which include rules and by-laws[15] and will include local laws) must be tabled in both Houses of Parliament within 6 sitting

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[10] The *Interpretation Act* refers to subsidiary legislation rather than subordinate legislation. As has already been noted, the Committee prefers the term subordinate legislation as this more accurately describes the subordinate nature of subordinate legislation. It is also consistent with the practice adopted in most other parts of Australia. For the purposes of this document, "subordinate legislation" and "subsidiary legislation" may be used interchangeably.

[11] Locke, J, *Two Treatises of Government*, Book II, para 137, cited in Allan, TRS, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge Law Journal* 111

[12] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613

[13] pp10-11.

[14] Western Australia, Joint Standing Committee on Delegated Legislation, *Young Offenders Regulations 1995 and Director General's Rules*, 17th Report, December 1995.

[15] *Interpretation Act 1984*, s 42(8).

days of their publication. If the regulations are not tabled within the 6 sitting days, they thereupon cease to have effect.

m. After tabling, either House may then disallow the regulations, provided notice of motion of disallowance is given within 14 sitting days of their tabling in the relevant House. Both Houses (in agreement) may amend the regulations.

n. In its 16th Report the Committee noted that one of the impediments to the Committee's scrutiny function is the limitation that it may only scrutinise "regulations" having legislative effect which, by reason of s 42(8) of the *Interpretation Act 1984* include "rules" and "by-laws" having legislative effect. "Local laws" have been added to s 42(8) by the *Local Government (Consequential Amendments) Act 1996.* Similarly, while all "subsidiary legislation"[16] must be *Gazetted*, only "regulations" must be tabled in Parliament. Thus Parliamentary scrutiny of subordinate legislation can be avoided if it is called something other than "regulations", "rules", "by-laws" or "local laws". The Committee noted in its 16th Report that this situation is not satisfactory. Subordinate legislation should be defined by reference to its purpose and effect, not by how it is nominally described in a particular case.

o. Furthermore, for "regulations", "rules", "by-laws" or "local laws" to fall within the definition of "regulations" under the *Interpretation Act*, they must have legislative effect. Thus they must involve the formulation of **general rules of conduct, usually operating prospectively, and will usually determine the content of the law rather than merely apply it**[17]. In this context the Committee notes that there appears to be much ignorance in some government agencies about the line between rules which have legislative effect and rules which are merely administrative policy. The Committee acknowledges that sometimes the distinction is not clear and that in some cases even senior lawyers may disagree on the character of a particular rule or rules. Consequently it is important that both government agencies and Parliamentary Counsel give consideration to whether or not particular rules have, or are intended to have, legislative effect. "Legislative effect" is the principle criterion to be used in a determination of what must be contained in subordinate legislation and what may be contained in administrative rules. In the Committee's view it is preferable to err on the side of including administrative rules in regulations rather than to include rules having legislative effect in administrative instruments which are not subject to Parliamentary scrutiny.

Scrutiny of subordinate legislation

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[16] *Interpretation Act 1984*, s 5.

[17] See, for example: Australia, Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, Report No 35, March 1992, p20; *Commonwealth v Grunseit* (1943) 67 CLR 58, 82; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 633.

p. The Western Australian Royal Commission into Commercial Activities of Government and Other Matters ("the Royal Commission") found that[18]:

> The least visible law making activity undertaken in this State is that by which statutory rules are made. These have a pervasive effect upon the lives and livelihood of the community. The Joint Standing Committee on Delegated Legislation and the *Interpretation Act 1984* constitute significant checks in the processes through which rules are given legal effect.

q. The scrutiny of subordinate legislation by parliamentary committees is the principal means by which Australian parliaments keep themselves informed of matters regarding subordinate legislation. In conjunction with the requirements to table subordinate legislation and the parliamentary power to disallow subordinate legislation, such committees enable parliaments to exercise an essential and useful form of control over the making of subordinate legislation. The High Court has said:

> When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself from the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it into account in the constitutional way by censure from his place in Parliament... That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses[19].

r. Thus the members of the Committee are, on behalf of the members of Parliament generally (who individually do not have the time necessary so to do), performing an important role in "watching... the conduct of the Executive" in the context of subordinate legislation. The Committee was created to perform the scrutiny function of Parliament because individual members of Parliament do not have the time to review the thousands of pages of subordinate legislation that are tabled each year.

s. As part of their scrutiny of subordinate legislation on behalf of parliaments, scrutiny committees also play a valuable role in identifying, at an early stage, possible grounds on which subordinate legislation can be challenged in the courts. This can result in: substantial savings in terms of avoidance of expensive litigation (which would otherwise also consume valuable court time); avoiding or reducing potential liability of governments for invalid action; and avoiding or reducing embarrassment of governments for invalid action.

t. Parliamentary committees for the scrutiny of subordinate legislation have existed in Australia since the first one was established by the Commonwealth Government in 1931. This was followed by South Australia in 1938, Victoria in 1956, New South Wales in 1960, Tasmania and the Northern Territory in 1969 and Queensland in 1975. In 1976, the

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[18] Western Australia, Royal Commission into Commercial Activities of Government and Other Matters, *Report*, Perth, 1992, Part II, para 5.7.9.

[19] *Horne v Barber* (1920) 27 CLR 494, 500.

Western Australian Parliament enacted legislation to create the Legislative Review and Advisory Committee, a statutory committee charged with the scrutiny of subordinate legislation[20]. It was not until 1987 that Western Australia abandoned the statutory committee and appointed a Parliamentary committee when it established the Joint Standing Committee on Delegated Legislation[21].

Committee an effective mechanism

u. In its 16th Report, *The Subordinate Legislation Framework in Western Australia*, the Committee concluded that, despite some of the impediments[22] to its scrutiny function which require reform in the manner considered in that report, the Committee is nevertheless an effective mechanism for scrutiny of subordinate legislation in Western Australia. Drawing equal representation from both Houses of Parliament, the Committee is proud of and carefully guards its ability to function with apolitical impartiality in its scrutiny of subordinate legislation. At the time of writing, the Government continues to have minority representation on the Committee, there being 4 members from the Australian Labor Party, 3 from the Liberal Party and 1 member of the Committee who is a member of the Greens WA. Essentially a sub-committee of the whole of the Parliament, the Committee believes that it fairly represents Parliament. The Committee considers that it is important that this fully representational and impartial structure be maintained and supported by Parliament. If it is not, the Committee could become a political entity which merely rubber-stamps bureaucratic or government policy simply because "it is policy" or has executive support. This would undermine the role of Parliament and its members as representatives of the community and severely limit the effectiveness of the Committee.

3. Committee Procedures

The Committee's Terms of Reference

a. The Committee's rules[23] provide:

> *It is the function of the Committee to consider and report on any regulation that:*
>
> *(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
>
> *(b) unduly trespasses on established rights, freedoms or liberties;*
>
> *(c) contains matter which ought properly to be dealt with by an Act of Parliament;*

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[20] *Legislative Review and Advisory Committee Act 1976.*

[21] 1987 WAPD 30, 636, 1636, 1754, 2457, 2944, 3728.

[22] These are set out in the Committee's 16th Report.

[23] A copy of the Committee's rules is attached as Appendix 2.

> *(d) unduly makes rights dependent upon administrative, and not judicial, decisions.*
>
> *If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.*

b. In the context of local laws made by local governments (as well as all other relevant subordinate legislation), the Committee is only concerned to ensure that the local laws do not infringe any of its terms of reference.

Explanatory memoranda (EM)

c. The Royal Commission found that[24]:

> ...accountability can only be exacted where those whose responsibility it is to call government to account are themselves possessed of, or are able to obtain, the information necessary to make considered judgements. Information is the key to accountability. Given Parliament's role as the primary accountability agent of the public, accurate information is its lifeblood. Without it, Parliament can be neutralised, the public left vulnerable.

This statement has been repeated in the McCarrey Report[25] and by the Commission on Government[26]. It was also referred to by the Committee in its 16th Report[27].

d. The Committee requires that, preferably upon publication in the *Gazette*, and no later than upon tabling, a government agency having responsibility for any relevant subordinate legislation must send to it 10 copies of the subordinate legislation together with 10 copies of an EM in respect of the subordinate legislation. Unfortunately this is not, as yet, a statutory requirement. Although the Premier has issued a Circular to Ministers (No. 9/96[28]) requiring agencies to comply with the Committee's requirements, many agencies ignore or fail to comply with the directive. This causes great difficulties for the Committee in its scrutiny function. Additionally, many agencies, whilst strictly complying with the form of

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[24] Western Australia, Royal Commission into Commercial Activities of Government and Other Matters, *Report*, Perth, 1992, Part II, para 2.4.2.

[25] Western Australia, Independent Commission to Review Public Sector Finances, *Report: Agenda for Reform*, June 1993, Vol 1, p49.

[26] Western Australia, Commission on Government, *Report No 1*, August 1995, p169.

[27] Western Australia, Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation Framework in Western Australia*, 16th Report, November 1995, p20.

[28] Circular to Ministers No. 9/96 (16 May 1996) replaced Circular to Ministers No. 37/93 (30 September 1993) which itself replaced Circular to Ministers No. 45/90 (25 May 1990). See also the Minister for Local Government's Circular to Local Governments No. 120, 15 August 1996, a copy of which is attached as Appendix 3.

the directive nevertheless fail to provide the Committee with relevant information about the substance of the subordinate legislation. Consequently, in its 16th Report, the Committee recommended that the requirements be made statutory. The Commission on Government commented[29]:

> Another constraint on the efficacy of the JSCDL is the lack of compliance by government departments and agencies in providing the Committee with sufficient information with which to examine proposed regulations. These bodies are often tardy in providing the information, resulting in the Committee having to put on a protective notice of motion of disallowance, simply because they have not been afforded the opportunity of properly scrutinising the proposed rules. This device preserves the Committee's capacity to recommend disallowance of delegated legislation after the disallowance period has expired. When the information is provided, it is often insufficient for the purpose; this reflects poorly on the agencies that indulge in such practices.

e. The Department of Local Government has been responsible for preparing EMs for the Committee in respect of by-laws made by local governments. Following commencement of the *Local Government Act 1995*, it will no longer perform this function.

Protective notice of motion of disallowance

f. Where an agency has not complied with the Premier's directive, the Committee has no choice but to give a "protective" notice of motion of disallowance (usually in the Legislative Council). If it does not do so, the relevant period in which a notice of motion of disallowance passes, and Parliament is then unable to disallow the subordinate legislation (other than by enacting primary legislation which overrides it). This process sends a signal to agencies that the Committee requires the subordinate legislation and EM immediately, and gives the Committee time to consider the subordinate legislation and EM when they are received.

g. The giving of a protective notice of motion of disallowance does not mean that the Committee will recommend disallowance of the relevant subordinate legislation, though that is an ultimate sanction where an agency continues to refuse to provide the Committee with materials which Parliament and the Premier require the agency to provide.

h. Whilst the Committee endeavours to advise relevant Ministers of its intention to give notice of motion of disallowance before it is given, this has not always proved possible because of the time constraints on the Committee. As a result of recent amendments to standing orders in the Legislative Council (discussed below), these processes have been put under an ever stricter timetable.

i. Protective notices of motion of disallowance are also used by the Committee where it identifies a matter of concern in subordinate legislation and time is required for the relevant agency or Minister to respond to the Committee's concerns.

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[29] Western Australia, Commission on Government, *Report No. 2*, Part 2, December 1995, p262.

Scrutiny by the Committee

j. Having received subordinate legislation and an EM after *Gazettal* or tabling, the materials are given preliminary consideration by the Committee's Advisory/Research Officer. They are then scrutinised by the Committee.

k. Where the Committee identifies that subordinate legislation transgresses any of the Committee's terms of reference, it will, in the first instance, seek comment from the agency responsible for the subordinate legislation. In most instances, matters are able to be resolved at this level.

l. If an agency is unable to satisfy the Committee's concerns, the Committee will approach the Minister responsible for the relevant subordinate legislation. The majority of matters which cannot be resolved at agency level are resolved at Ministerial level.

m. If a matter is not resolved at Ministerial level, the Committee will report the matter to Parliament, with or without a recommendation for disallowance of the relevant subordinate legislation. The ultimate fate of subordinate legislation therefore remains with the Houses of Parliament. The Committee recommends disallowance of subordinate legislation in only the most exceptional circumstances. To date, the Western Australian Parliament has not overruled a recommendation for disallowance made by the Committee[30].

n. As has been observed by both the Chairman and Deputy Chairman of the Committee, it is not the role or purpose of the Committee to hinder effective government. The Committee very carefully guards its apolitical impartiality. However, it is the duty of the Committee to ensure that, within its terms of reference, government is accountable and government efficiency is maintained within the bounds of what is required by a representative democracy based on the rule of law.

Legislative Council Standing Orders

o. Late in 1995, the Legislative Council amended its Standing Orders in respect of disallowance motions over "regulations". The combined effect of the amendments is to:

   i. require the Chair, during the routine of business, to inquire separately if there are any notices of motion of disallowance;

   ii. where a motion is not moved within 2 sitting days after the notice is given, the motion is deemed to have been moved so that SO 153 applies.

p. SO 153 provides that where such a motion remains unresolved at the expiration of 10 sitting days, the motion shall be put and determined on the next sitting day; or if Parliament is prorogued before that time, the motion is deemed to have been resolved in the affirmative.

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30 Such recommendations have, however, lapsed as a result of prorogation of Parliament.

q. The principle aim of the amendments is to improve the efficiency of the procedures of the House. The House is justifiably concerned about notices of motion of disallowance that sit on the notice paper for long periods of time and may in fact fall off when the House is prorogued.

r. As a result of the fact that the Legislative Council is traditionally the house of review[31], and because of administrative procedures which are available within the Legislative Council but are not available within the Legislative Assembly, most of the formal mechanisms for review of subordinate legislation (such as protective notices of motion of disallowance) are, as a practical matter, implemented in the Legislative Council. The amendments therefore have a significant impact on the Committee's operations.

s. As a result of the amendments it has become imperative that the Committee receive the EM at the latest by the time that subordinate legislation is tabled, and preferably when it is *Gazetted*. Where this information is not received on time, the Committee, in accordance with its long-standing practice, will continue to give a notice of motion of disallowance of the subordinate legislation. As a result of the amendments, once such a notice is given, the motion will automatically be put within 2 sitting days and determined within a further 10 sitting days (or resolved in the affirmative if Parliament is prorogued and the matter is not resolved). Consequently, the Committee will now be compelled to act in respect of such a notice within a limited time. If relevant information is not received on time, the Committee will have no choice but to support disallowance of the relevant subordinate legislation.

t. The Committee wrote to all Ministers on 23 November 1995 and again on 22 March 1996 to advise them of these changes to the Legislative Council's Standing Orders and the impact that they will have on the making of subordinate legislation.

4. Local Laws under the *Local Government Act 1995*

Local laws are subsidiary legislation

a. The *Local Government (Consequential Amendments) Act 1996* amended the *Interpretation Act 1984* to include local laws in the meaning of subsidiary legislation. In particular, local laws will be added to the definition of "subsidiary legislation" in s 5 and to the definition of "regulations" in s 42(8) of the *Interpretation Act 1984*.

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[31] The Royal Commission recommended that:

> The Legislative Council be acknowledged as having the review and scrutiny of the management and operations of the public sector of the State as one of its primary responsibilities.

(Western Australia, Royal Commission into Commercial Activities of Government and Other Matters, *Report*, Perth, 1992, Part II, para 5.3.7.)

Legislative power of local governments

b. The *Local Government Act 1995* prescribes the legislative power of local governments. Section 3.5 provides:

> 3.5(1) A local government may make 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.
>
> (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, of for such a purpose or of such a kind.

c. This is a very broad delegation of Parliament's legislative power. Consequently local laws will require careful consideration by local governments and scrutiny by the Committee.

d. Other provisions relating to the power of local governments to make local laws, or restrictions on that power, include sections 3.6, 3.7, 3.8, 3.9, 3.10, 3.16 and 3.17.

The making of local laws

e. The procedure for making local laws largely is set out in s 3.12 of the *Local Government Act 1995*. A self-explanatory flowchart of what is anticipated to be a typical procedure for the making of a local law is set out in Appendix 1B.

f. The purpose of this document is only to describe the background to, necessity for and procedures of the Parliamentary scrutiny of local laws as subsidiary legislation. Consequently, details of the whole process of making local laws are not contained in this document.

g. It is important to note that, with the delegation of broad legislative power to local governments, local governments will have a greatly increased responsibility to ensure that local laws made by them are appropriately drafted. This will require local governments to seek appropriate legal advice when making local laws. If solicitors are instructed to draft

local laws on behalf of a local government, the local government must ensure that precise instructions regarding the content of the local laws are given to the solicitors. **The Committee will not assist local governments with the drafting of local laws.**

h. Furthermore, local laws should be drafted in grammatically correct plain English. This is because people who are expected to comply with them must be able to understand them. In drafting local laws, local governments will be required to pay great attention to detail including, but not limited to, details such as typing, layout, grammar and spelling, gender neutral language and the potential of relevant local laws to discriminate against people including, for instance, those with disabilities.

i. Thus with the increased autonomy conferred on local governments in respect of local laws, there is also greatly increased responsibility.

The role of the Department of Local Government

j. Prior to commencement of the *Local Government Act 1995*, the role of the Department of Local Government in the making of by-laws was to provide a level of scrutiny of by-laws to confirm that they were within the powers delegated by Parliament to local governments to make them and to edit the by-laws to ensure that they reflected the intentions of local governments in making them and would operate accordingly. The Department also alerted local governments to matters of State policy which may have impacted upon by-laws. And the Department prepared EMs on behalf of local governments for submission to the Committee.

k. Although it is not, at the time of writing, certain exactly what role the Department will play following commencement of the *Local Government Act 1995*, it appears that it no longer will provide scrutiny services to local governments to the same extent. In particular, the Department will no longer provide its "editorial service" which formerly ensured that the by-laws drafted reflected the intentions of the relevant local government and would operate accordingly. Consequently, it is incumbent upon local governments to obtain appropriate legal advice when drafting local laws in order to ensure that the local laws in fact give effect to the intentions of the local government. The Committee will not provide the editorial service that was formerly provided by the Department. If local laws are not appropriately drafted, it may be that they will fall within one or more of the Committee's terms of reference and the Committee may be required to recommend their disallowance to Parliament. In this case, the relevant local government may have to re-make the relevant local law in different terms. It would be preferable, simpler and more cost effective for local governments to ensure that local laws are appropriately drafted in the first instance. Furthermore, if local laws are appropriately drafted in the first instance, this will avoid any difficulty in seeking to enforce them at a later time.

l. The Department will, for a transitional period after commencement of the *Local Government Act 1995*, continue to provide a limited scrutiny service in order to assist local governments to ensure that local laws are within the power delegated by Parliament to make them. However, the primary responsibility for compliance with this legal requirement will lie with local governments. Again, it is important that local governments obtain appropriate legal advice to ensure that local laws which they wish to promulgate comply with these requirements.

m. Thus, following commencement of the *Local Government Act 1995*, local governments will not, in respect of local laws under the *Local Government Act 1995*, be able to rely on the Department to correct their errors and omissions and advise them on questions of law. Failure by local governments to take responsibility for these matters themselves may result in consequences such as disallowance of local laws by Parliament or expensive legal challenges to the validity of local laws.

n. **Importantly, the Department will not prepare EMs on behalf of local governments in respect of local laws. Thus local governments will be required to prepare their own EMs, answer questions raised by the Committee and generally comply with the procedures for Parliamentary scrutiny of local laws.**

o. The Department of Local Government is, at the time of writing, giving consideration to production of a manual on legislative drafting to assist local governments in their drafting of local laws. It is not known whether this task is viable or when it will be completed.

The role of the Committee

p. The general procedures followed by the Committee in examining subordinate legislation are set out in section 3 of this document. Following is a description of how they will apply specifically to local laws.

q. The Committee requires that, upon publication in the *Gazette*, and no later than upon tabling, a local government having responsibility for any relevant local law must send to it 10 copies of the local law together with 10 copies of an explanatory memorandum (EM - see paragraphs 4.23 - 4.34, below) in respect of the local law. Some local governments that are distant from Perth may have some difficulty in complying with these time constraints. If a local government anticipates that it will have such difficulties, it should make alternative arrangements with the Committee **before** the difficulties arise.

r. Where relevant materials are not received in time for the Committee adequately to perform its scrutiny function, it will give a protective notice of motion of disallowance of the local law in the Legislative Council. If the materials are still not received in time, the local law may be disallowed and it will have to be re-made (from the beginning of the process) by the local government. **Under Parliamentary Standing Orders the Committee functions under strict time constraints and therefore cannot grant extensions of time for compliance by local governments.**

s. Having received a local law and an EM after *Gazettal* or tabling, the materials are given preliminary consideration by the Committee's Advisory/Research Officer. They are then scrutinised by the Committee.

t. Where the Committee identifies that a local law transgresses any of the Committee's terms of reference, it will, in the first instance, seek comment from the local government responsible for the local law. It is hoped that, in most instances, matters will be resolved at this level.

u. If a local government is unable to satisfy the Committee's concerns, the Committee will approach the Minister for Local Government (or other relevant responsible Minister). Note that the Minister for Local Government has power to direct local governments to provide to Parliament copies of local laws and explanatory or other material (s 3.12(7) *Local Government Act 1995*).

v. If a matter is not resolved at Ministerial level, the Committee will report the matter to Parliament, with or without a recommendation for disallowance of the relevant local law. The ultimate fate of local laws therefore remains with the Houses of Parliament. The Committee recommends disallowance of subordinate legislation in only the most exceptional circumstances. To date, the Western Australian Parliament has not overruled a recommendation for disallowance made by the Committee[32].

What must be contained in an EM

w. EMs should be prepared by local governments after the text of a local law is finalised and before it is published in the *Gazette*. Ten copies of each of the local law and its EM should be sent to the Committee immediately after the local law is *Gazetted* (current practice is that photocopies of the *Gazetted* copy of the local law are sent to the Committee with the EM). If it is not possible for local governments to send copies of the local law as *Gazetted* to the Committee (for instance, by a local government which is distant from Perth and does not receive the *Gazette* until several days after it is published), copies of the local law as it is sent to the *Gazette* should be provided to the Committee. (Note: the EM is NOT *Gazetted*.)

x. EMs must contain:

i. the name of the local government;
ii. the title of the local law;
iii. identification of the section(s) of the statute(s) under which the local law is made;
iv. a description of the purpose and effect of, and justification for, the local law (or any amendments to or repeals of it);
v. identification of any unusual or controversial provisions;
vi. details of consultations undertaken (including details of the Statewide public notice given and copies of submissions received and the local government's response to the submissions);
vii. reasons justifying any change in fees, charges or penalties, and details of the amount of the fee, charge or penalty before the change;
viii. a disclaimer to the effect that the explanatory memorandum is only an aid to understanding and must not be substituted for the local law *Gazetted*, or made available to the public in any way; and
ix. the name and telephone number of a person whom the Committee may contact if it has any questions regarding the local law.

This is supported by the Minister for Local Government's Circular to Local Governments No. 120, a copy of which is attached as Appendix 3.

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[32] Such recommendations have, however, lapsed as a result of prorogation of Parliament.

y. Title of the local law

The EM must identify the local law to which it relates. The name of the local law could be the heading of the EM. For example:

*City of *** - Amendment to Local Law relating to Restaurants*.

z. Identification of the section(s) of the statute(s) under which the local law is made

The EM must identify the section(s) of the statute(s) under which the local law is made. For example:

This local law is made under s 3.5 of the Local Government Act 1995 *and s ## of the* Health Act 1911.

aa. A description of the purpose and effect of, and justification for, the local law (or any amendments to or repeals of it)

The EM must identify the purpose and effect of the local law. The amount of detail required in this section is dependent on the extent of the effect of the local law. Local laws which have a large effect will require a fuller explanation than local laws which have little effect. The information contained in this section may contain historical or background information and scientific or technical information. More particularly:

i. Where a local law is being made for the first time, a general description of the purpose and effect of the law as a whole may be sufficient. Some cases may require a description of the purpose and effect of each part of the local law. And other cases may require a description of the purpose and effect of each of the major sections of the local law.

ii. If changes to a proposed local law are made after publication of the original draft of the proposed local law under the *Local Government Act 1995* (for example, as a result of public submissions received), reasons for the change should be stated.

iii. Where the relevant local law amends an existing local law, one copy of the text of the local law as it existed prior to the amendment should also be provided to the Committee. Alternatively, a table containing a column for each of:

the text of the local law before the amendment;
the text of the local law as amended; and
a brief summary of the reasons for the amendment

could be prepared and provided to the Committee. For example:

Before Amendment	*As Amended*	*Reason*
18. Upon payment of the prescribed fee, a restaurant may be licensed to place tables on the footpath in front of the restaurant.	*18. Upon payment of the prescribed fee, a restaurant may be licensed to place tables on the footpath in front of the restaurant subject to such conditions as are prescribed in this local law and provided such tables do not restrict the public's right of way.*	*It was found that some restaurants were placing tables which occupied the whole of the footpath, thus forcing pedestrians to walk on the road. This was considered to be unsafe. New section ## prescribes conditions which will apply to all licences for footpath dining.*

OR, if it is not possible to provide such a table, the information could be included as a separate paragraph under the relevant heading. For example:

> *This local law amends section 18 of the* City of *** - Local Law relating to Restaurants *which permits restaurants to place tables on the footpath outside the restaurant. It was found that some restaurants were placing tables which occupied the whole of the footpath, thus forcing pedestrians to walk on the road. This was considered to be unsafe. New section ## prescribes conditions which will apply to all licences for footpath dining. A copy of section 18 as it existed before this amendment is attached as Attachment 1.*

The Committee prefers that an appropriate table be provided, but understands that this may not always be possible.

iv. Where a local law repeals an existing by-law or local law, one copy of the by-law or local law to be repealed should be provided to the Committee (together with an explanation of the reasons for, and effects of, the repeal).

bb. Identification of any unusual or controversial provisions

This will help the Committee to identify matters which may infringe on its terms of reference. Controversial provisions may be identified by a local government where there was dispute or controversy in public submissions or consultations in respect of a local law, or in local government meetings to make the local law. Unusual provisions do not necessarily include provisions which simply did not exist beforehand (although these may also be unusual) and may include matters which unusually "trespass upon established rights, freedoms and liberties".

cc. Details of consultations undertaken

This section of the EM should include details of the dates on which and publication in which Statewide public notice was given under s 3.12 of the *Local Government Act 1995* and a summary of any submissions received together with the response of the local government to those submissions. It should be supported by enclosing copies of the submissions, the relevant administrative officer's report on the submissions to the local government and the relevant extract from the local government's minutes. In the case of amendments to a local law, if a table is created as suggested above, the summary of submissions could be contained in the third column of the table with the reason for the amendment. For example:

Before Amendment	*As Amended*	*Reason*
18. Upon payment of the prescribed fee, a restaurant may be licensed to place tables on the footpath in front of the restaurant.	*18. Upon payment of the prescribed fee, a restaurant may be licensed to place tables on the footpath in front of the restaurant subject to such conditions as are prescribed in this local law and provided such tables do not restrict the public's right of way.*	*It was found that some restaurants were placing tables which occupied the whole of the footpath, thus forcing pedestrians to walk on the road. This was considered to be unsafe. New section ## prescribes conditions which will apply to all licences for footpath dining.* *The City of *** advertised the proposal to amend its Local Law relating to Restaurants as required under s 3.12 of the Local Government Act 1995. Three submissions were received. Copies of the submissions and the City of ***'s response to them are attached.*

OR, if a table is not provided, the information could be included as a separate paragraph under the relevant heading. For example:

> *The City of *** advertised the proposal to amend its Local Law relating to Restaurants as required under s 3.12 of the Local Government Act 1995. Three submissions were received. Two supported the amendments and one (from a restauranteur) opposed the amendments. Copies of the submissions and the City of ***'s response to them are attached.*

dd. Reasons justifying any change in fees, charges or penalties, and details of the amount of the fee, charge or penalty before the change

Generally the Committee is not concerned with changes in fees, charges or penalties which do not exceed the change in the Consumer Price Index (CPI) for the corresponding period

(ie since imposition of the fee, or the last increase in the fee). Note that the Committee relies on CPI figures provided by State Treasury. If increases are greater than the increase in the CPI, more detailed reasons should be provided. For example:

> *Sched 1, Item 3: The licence fee for a licence to place restaurant tables on a footpath has been increased from $100 per year to $105 per year (an increase of 5%). The last increase in the fee was in June 1995 and the change in the CPI since that time has been 4.9%.*

OR

> *Sched 1, Item 3: The licence fee for a licence to place restaurant tables on a footpath has been increased from $100 per year to $120 per year (an increase of 20%). The last increase in the fee was in June 1995 and the change in the CPI since that time has been 4.9%. The reason that the fee has been increased by more than the corresponding increase in the CPI is that the City of *** has calculated that it now costs $120 to provide the licence:*
>
> | | |
> |---|---|
> | *Initial inspection* | *$50* |
> | *2 x follow-up inspections (@ $25 dollars each)* | *$50* |
> | *Administrative cost of issuing licence* | *$20* |

OR, the change in fees could be set out in a table similar to the table of amendments:

Before Amendment	*As Amended*	*Reason*
Sched 1, Item 3: *$100*	*Sched 1, Item 3:* *$120*	*The last increase in the fee was in June 1995 and the change in the CPI since that time has been 4.9%. The reason that the fee has been increased by more than the corresponding increase in the CPI is that the City of *** has calculated that it now costs $120 to provide the licence:* *Initial inspection $50* *2 x follow-up inspections (@ $25 dollars each) $50* *Administrative cost of issuing licence $20*

ee. A disclaimer to the effect that the explanatory memorandum is only an aid to understanding and must not be substituted for the local law *Gazetted*, or made available to the public in any way

This is a government requirement to ensure that information provided to the Committee remains confidential to the Committee and does not confuse interpretation of local laws. The disclaimer is very simple:

This explanatory memorandum is only an aid to understanding and must not be substituted for the local law Gazetted *or made available to the public in any way.*

ff. Contact Person

The EM should also contain the name and telephone number of the most appropriate authorised person to contact in the event that the Committee requires further information about the relevant local law. If the Committee makes a request for further information, this must be provided within the shortest possible time.

gg. Signature

The EM must be signed by the Chief Executive Officer of the relevant local government, and initialled by the Mayor or President. It is not necessary that it also be signed by the Minister.

hh. Check List

A check list of procedures regarding EMs appears at the beginning of this document on page vii following the "Summary".

Adoption of model local laws

ii. The Committee encourages, in appropriate circumstances, the adoption by local governments of model local laws made by the Governor under s 3.9 of the *Local Government Act 1995*. Where a local law adopts a model local law which has previously been scrutinised by the Committee, the EM prepared by the local government should:

i. state the title and *Gazettal* date of the model local law;

ii. contain the information required to be contained in an EM only about any variations that are made to the model local law (that is, the EM need not contain information about provisions of the model local law which are adopted without variation).

jj. When the ten copies of the local law and EM are sent to the Committee, one copy of the model local law which has been adopted (including all amendments to it) should also be sent to the Committee.

The obligations of local governments

kk. In summary, the obligations of local governments in making local laws, so far as Parliamentary scrutiny is concerned, are:

i. to ensure that local laws are appropriately drafted, made within powers conferred for their making and are not inconsistent with any Act or other subsidiary legislation (see s 3.7 of the *Local Government Act 1995*);

ii. to prepare and provide to the Committee at the time of *Gazettal* of a local law, EMs which contain appropriate and adequate information to enable the Committee to perform its scrutiny function; and

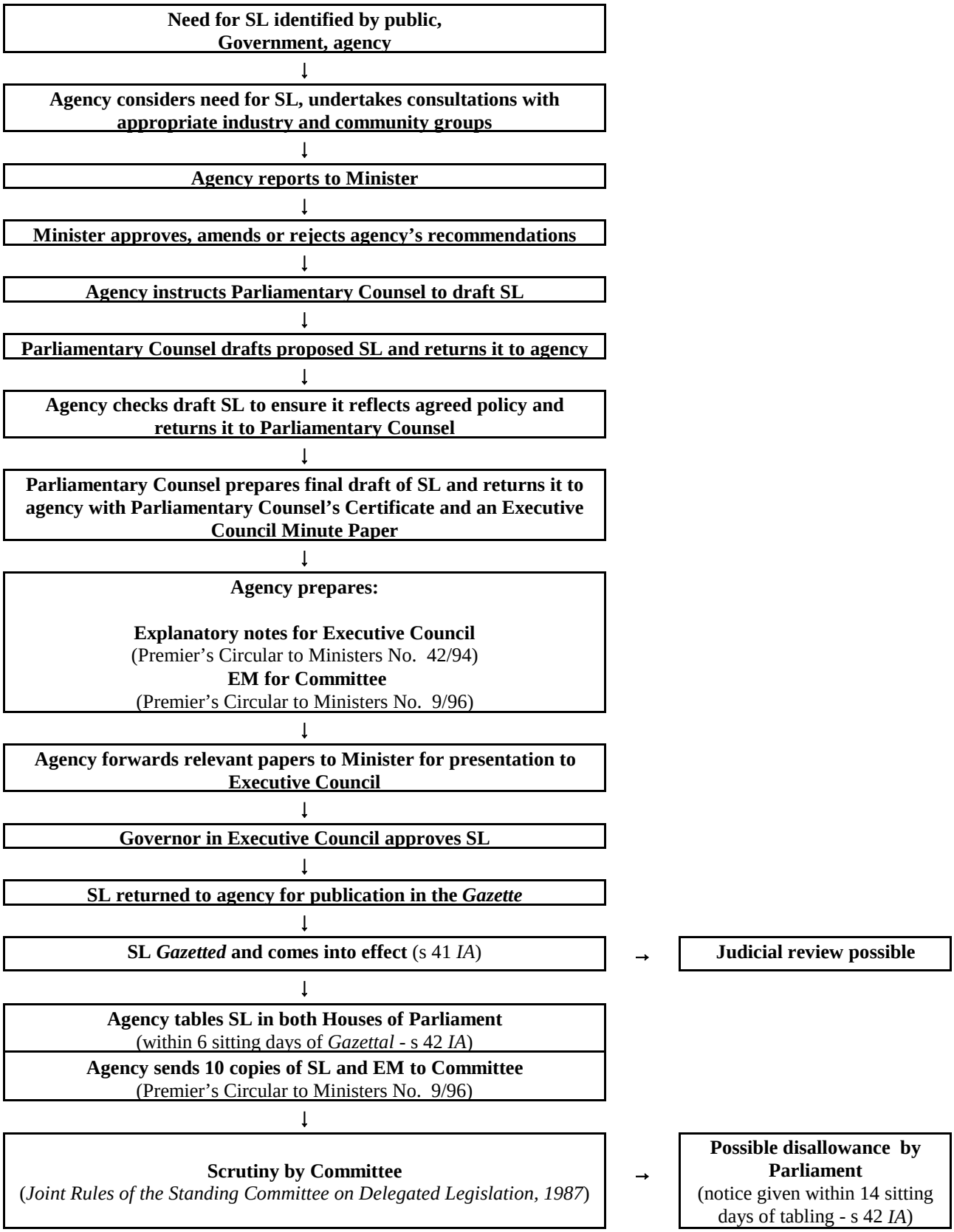
iii. to answer any questions the Committee may have regarding any local laws within the shortest possible time.

Periodic review of local laws

ll. Section 3.16 of the *Local Government Act 1995* requires that local laws be reviewed 8 years after they commenced to operate. Ten copies of the report of any such review should be provided to the Committee forthwith after the local government makes its determination whether or not it considers that the local law should be repealed or amended (regardless of whether or not repeal or amendment is considered necessary). At this stage it is assumed that the report of the review will contain sufficient information for the Committee's purposes and it will not be necessary for the local government also to prepare an EM in respect of any repeal or amendment of the local law. If the report of the review does not contain sufficient information for the Committee's purposes, then a separate EM will have to be prepared.

Appendix 1A

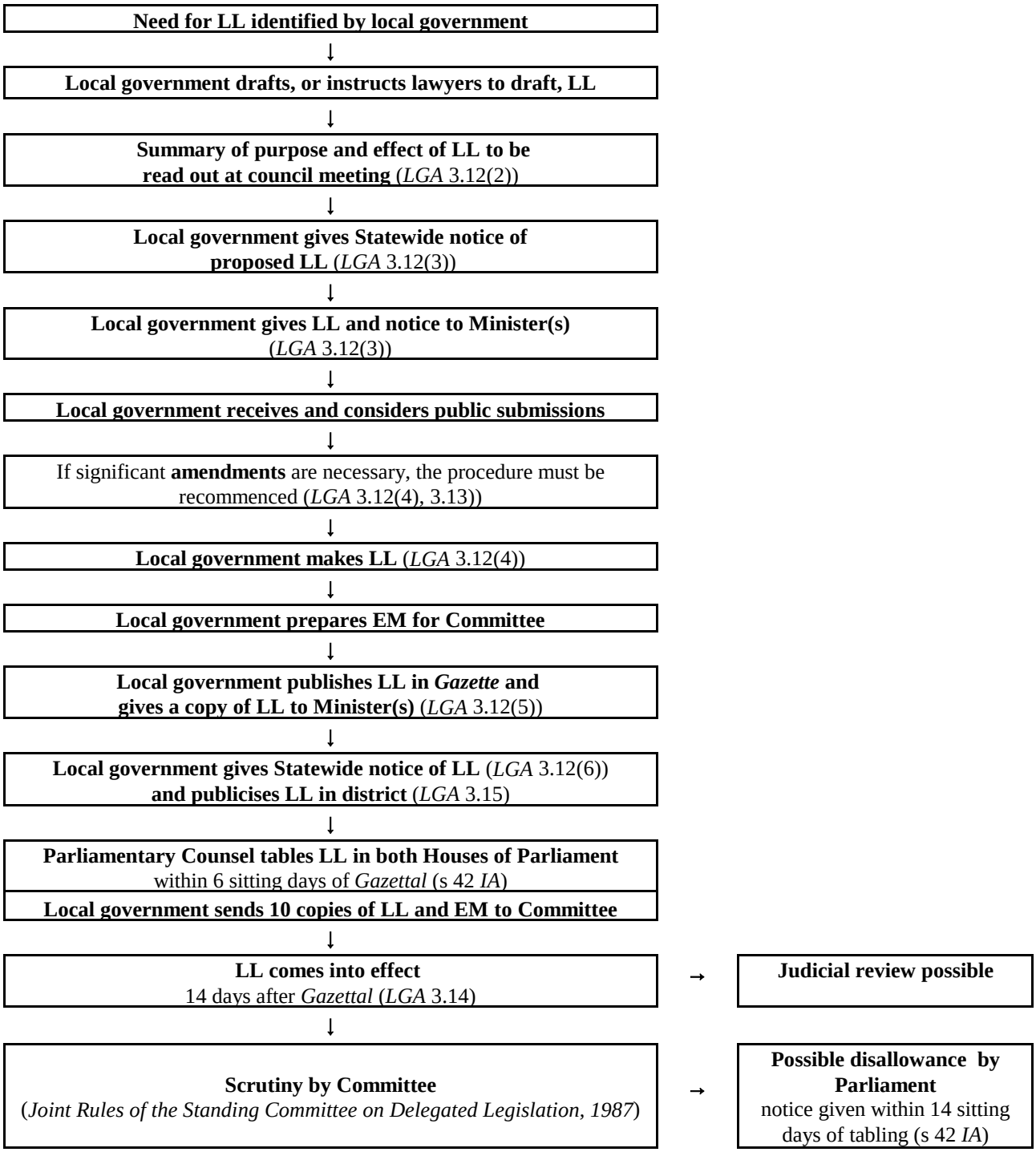
Flowchart of a typical process of making subsidiary legislation



Committee = Joint Standing Committee on Delegated Legislation
EM = Explanatory Memorandum
IA = *Interpretation Act 1984*
SL = subsidiary legislation which is a regulation, rule or by-law as defined in ss 5 & 42 *IA*

Appendix 1B

Flowchart of the anticipated typical process of making local laws



Committee = Joint Standing Committee on Delegated Legislation
EM = Explanatory Memorandum
IA = *Interpretation Act 1984*
LGA = *Local Government Act 1995*
LL = local law

Appendix 2

RULES OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION[33]

1. The Standing Committee on Delegated Legislation (the "Committee") shall consist of 4 members of the Legislative Assembly and 4 members of the Legislative Council.

2. (1) The Assembly members of the Committee shall be chosen as the House may determine but, where there is a party in the Assembly of not less than 5 members, other than a party whose leader is either the Premier or the Leader of the Opposition, 1 of the Assembly members of the Committee shall be a member of that party.

(2) The term of office of each Committee member extends from the time of election to the Committee until the expiration of that Parliament during which he was elected.

(3) When a vacancy occurs on the Committee during a recess or a period of adjournment in excess of 2 weeks the President or the Speaker, as the case may be, may appoint a member to fill the vacancy until an appointment can be made by the Council or Assembly as the case may be.

(4) A member may resign from membership of the Committee at any time by writing addressed to the President or Speaker, as the case may require, and the appropriate Presiding Officer shall thereupon notify the House of the vacancy, and any member elected to fill that vacancy holds office for the balance of the vacating member's term and is eligible for re-election.

3. A person shall not be elected to, or continue as, a member of the Committee if that member is or becomes:

(a) a Minister of the Crown;
(b) the President of the Legislative Council;
(c) the Speaker of the Legislative Assembly; or
(d) the Chairman of Committees of the Legislative Council or of the Legislative Assembly.

4. At its first meeting and thereafter as occasion requires the Committee shall elect from its members a Chairman who belongs to a party or parties supporting the Government, and a Deputy Chairman.

5. It is the function of the Committee to consider and report on any regulation that:

(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which is purports to be made;

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[33] See 1987 WAPD 30 & 3731

(b) unduly trespasses on established rights, freedoms or liberties;

(c) contains matter which ought properly to be dealt with by an Act of Parliament; or

(d) unduly makes rights dependent upon administrative, and not judicial, decisions.

6. (1) If the Committee is of the opinion that any of the Regulations ought to be disallowed, in whole or in part, it shall report that opinion and the grounds thereof to each House before the end of the period during which any motion for disallowance of those Regulations may be moved in either House, but if both Houses are not sitting, it may report its opinion and the grounds thereof to the authority by which the Regulations were made.

(2) Where a report is made to the regulation-making authority pursuant to rule 6(1), a copy of the report shall be delivered to the Clerk of each House who shall make it available to any member for perusal, and any such report shall be tabled in each House not later than 6 sitting days from the start of the next ensuing sitting of each House.

7. If the Committee is of the opinion that any other matter relating to any Regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

8. A report of the Committee shall be presented in writing to each House by a member of the Committee nominated for that purpose by the Committee.

9. The Committee has power to send for persons, papers and records, and to sit during a recess or an adjournment of either House or of both Houses.

10. A quorum for the conduct of business is 4 members of whom not less than 2 shall be members of the Assembly and not less than 2 members of the Council.

11. Except to the extent that they impinge upon the functioning of the Committee, its proceedings shall be regulated by the standing orders applicable to Select Committees of the Legislative Council.

Appendix 3

TO ALL LOCAL GOVERNMENTS

CIRCULAR No. 120

LOCAL LAWS EXPLANATORY MEMORANDA DIRECTIONS

I, *Paul Omodei*, being the Minister charged for the time being with the Administration of the Local Government Act 1995, acting under the powers of section 3.12(7) of the said Act and Interpretation Act 1984, do hereby give the following directions.

[Signature: Paul Omodei]

Paul Omodei
Minister for Local Government

15 August 1996

1 CITATION AND APPLICATION

1) These directions may be cited as the Local Laws - Explanatory Memoranda Directions 1996.

2) These directions apply from the 15 August 1996.

2 OBJECTS

The object of these directions is to assist the Joint Standing Committee on Delegated Legislation which examines all regulations, rules, by-laws, local laws and other subsidiary legislation made subject to s 42 of the Interpretation Act 1984. The Committee performs this function on behalf of the Parliament of Western Australia.

3 LOCAL LAWS - EXPLANATORY MEMORANDA

Following the *Gazettal* of a local law by a local government it shall immediately provide to the Joint Standing Committee on Delegated Legislation an Explanatory Memorandum.

As part of the local law making procedure a local government must prepare for each local law an explanatory memorandum containing the following:

1) name of the administering authority;

2) the title of the local law;

3) identification of the section(s) of the statute(s) under which the local law is made;

4) a description of the purpose and effect of, and justification for, the local law (or any amendments to or repeals of it);

5) identification of any unusual or controversial provisions;

6) details of consultations undertaken (including details of the Statewide public notice given and copies of submissions received and the local government's response to the submissions);

7) reasons justifying any change in fees, charges or penalties, and details of the amount of the fee, charge or penalty before the change;

8) a disclaimer to the effect that the explanatory memorandum is only an aid to understanding and must not be substituted for the local law *Gazetted*, or made available to the public in any way; and

9) the name and telephone number of a person whom the Committee may contact if it has any questions regarding the local law.

Ten copies of each of the relevant local law and explanatory memorandum must be provided to the Joint Standing Committee on Delegated Legislation immediately after it is *Gazetted*. If the local law adopts a model local law, **one copy** of the model local law (including all amendments made to it) must also be sent to:

Advisory/Research Officer
Joint Standing Committee on Delegated Legislation
Legislative Council
Parliament House
PERTH WA 6000

Additional information on the preparation of an explanatory memorandum may be obtained from Andrew Mason, Joint Standing Committee on Delegated Legislation, on (09) 222 7300.

Attached for the assistance of local governments is a brief example of an explanatory memorandum as prepared by the Department of Local Government.

EXAMPLE
EXPLANATORY MEMORANDUM

1. ADMINISTERING AUTHORITY

City of .....

2. TITLE OF LOCAL LAWS

Signs Amendment Local Laws

3. SECTION OF ACT

The local laws are made under s 3.5 and s 3.10 of the *Local Government Act 1995.*

4. PURPOSE OF THE LOCAL LAWS

The amendments to the local laws are to:

- permit a maximum of one portable 'A' frame sign to be located in a street reserve adjoining the premises to which the sign relates;
- specify standards for construction and erection of portable signs;
- increase license fees for all types of signs provided for by the local laws;
- increase the maximum penalty for a breach of the local laws from $500 to $2000; and
- provide for infringement notices and a modified penalty of $100.

5. IDENTIFICATION OF UNUSUAL OR CONTROVERSIAL PROVISIONS

The amendments provide for portable signs not to be wind driven rotating devices.

6. DETAILS OF CONSULTATIONS, SUBMISSIONS AND RESPONSES

In accordance with s 3.12(3) of the Act, two Statewide public notices summarising the purpose and effect of the local laws were published in the *West Australian* and a copy forwarded to the Minister for Local Government.

One submission was received which objected to the prohibition on wind driven rotating portable signs on the grounds that they were widely used and accepted by the public.

The Council considered the submission but disagreed with the objector's reasons as it was of the view that:

- such signs are inherently dangerous to pedestrian traffic; and
- the Council has a duty of care to protect the public from possible injury from authorised devices on land under its control.

The local laws have been the subject of consultation between the City and the Business Association.

7. REASONS FOR FEES, CHARGES AND PENALTIES

(A) the present licence fees were set in 1980 and have been increased by 200% which exceeds the increase in the CPI increase of 117.9 for that period. The fees are:

- roof sign	$20 increased to $60
- pylon sign	$20 increased to $60
- all other signs	$15 increased to $45

The reason for the increase is to enable the Council to recover the cost of issuing and maintaining each type of licence as follows:

- initial inspection	$25
- two follow-up inspections	$25
- administration cost to issue the licence	$10

(B) The penalty provisions have been increased to $2,000 because the previous maximum of $500 was considered inadequate to provide an appropriate penalty for a person who erects an unauthorised or non complying sign. It is also necessary for the maximum penalty to be increased as the Council is restricted to making a modified penalty which does not exceed 10% of the maximum fine. A modified penalty of $75 has been imposed for the offence of an unauthorised sign.

8. DISCLAIMER

The Explanatory Memorandum is produced only as an aid to understanding the abovementioned Local-laws and must not be substituted for the Local-laws or gazetted or made available to the public in any manner or circumstance.

9. CONTACT REFERENCES

The contact person for any enquiries on this matter is Director Corporate Services (telephone 888 8888).

Signature	**Signature**
Mayor/President	**CEO, City of .....**

EXPLANATORY MEMORANDUM

1. ADMINISTERING AUTHORITY

2. TITLE OF LOCAL LAWS

3. SECTION OF ACT

4. PURPOSE OF THE LOCAL LAWS

5. IDENTIFICATION OF UNUSUAL OR CONTROVERSIAL PROVISIONS

6. DETAILS OF CONSULTATIONS, SUBMISSIONS AND RESPONSES

7. REASONS FOR FEES, CHARGES AND PENALTIES

8. DISCLAIMER

9. CONTACT REFERENCES

_____	**_____**
Signature	**Signature**
Mayor/President	**CEO**
	City/Town/Shire of