SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE
JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION
IN RELATION TO
ISSUES OF CONCERN RAISED BY THE
COMMITTEE BETWEEN JUNE 9 2003 AND
DECEMBER 19 2003 WITH RESPECT
TO LOCAL LAWS

Presented by Mr Martin Whitely MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

Report 8
April 2004

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing orders:

"**6. Delegated Legislation Committee**

6.1 A *Delegated Legislation Committee* is established.

6.2 The Committee consists of 8 members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.

6.3 A quorum is 4 members of whom at least 1 is a member of the Council and 1 a member of the Assembly.

6.4 A report of the Committee is to be presented to each House by a member of each House appointed for the purpose by the Committee.

6.5 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.

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

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness; or

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; or

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable;

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

6.7 In this clause –

"adverse effect" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"instrument" means –

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*."

Members as at the time of this report:

Mr Martin Whitely MLA (Chairman)
Hon Ray Halligan MLC (Deputy Chairman)
Hon Alan Cadby MLC
Hon Robin Chapple MLC
Hon Ljiljanna Ravlich MLC
Mr Rod Sweetman MLA
Mr Terry Waldron MLA
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1 BACKGROUND

1.1 The Parliament of Western Australia has delegated its function of scrutinizing subsidiary legislation to the Joint Standing Committee on Delegated Legislation (**Committee**). The Committee's function is to consider whether any subsidiary legislation breaches its terms of reference; for example, whether a piece of subsidiary legislation is authorized or contemplated by the empowering enactment.[1]

1.2 'Subsidiary legislation' is defined in the Committee's terms of reference to mean:

> *…any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument, made under any written law and having legislative effect;*[2]

1.3 The purpose of this Report is to inform Parliament, local governments and all other stakeholders in the local law making process of the Committee's position in relation to certain issues that the Committee has encountered with respect to local laws between June 9 2003 and December 19 2003. These issues include:

- offending the Committee's terms of reference 6.6(a), (b), (d) and (f);[3]
- providing local governments with powers and immunities that are not authorized or contemplated by the empowering Act, such as ouster clauses and powers of entry onto private land ;
- regulating matters in such a manner that the local law is inconsistent with the empowering Act or another 'written law'[4];
- imposing unreasonable requirements on local government residents;

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1 Term of reference 6.6(a).

2 Term of reference 6.7; section 5 of the *Interpretation Act 1984*.

3 Refer to the Committee's terms of reference on the inside cover of this Report.

4 As defined in section 5 of the *Interpretation Act 1984.*

- problematic drafting and drafting techniques, such as incorporation by reference; and

- failing to provide information to the Committee in a time and manner that allows it to effectively fulfil its scrutiny role.

1.4 It is the Committee's intention that the discussion of these issues will:

- assist in improving the standard of local laws; and

- result in greater certainty for local governments, with fewer local laws coming before the Committee that infringe its terms of reference.

2 DRAFTING AND SCRUTINY OF LOCAL LAWS

2.1 Local laws are drafted by external consultants, administrative officers within local governments, or by legal practitioners. Local laws are often drafted by:

- using a *pro forma* local law that has been developed by the Western Australian Local Government Association (**WALGA**) as a template;

- adopting (and modifying) another local government's local law; [5] or

- adopting (and modifying) a model local law that the Governor has caused to be prepared and published in the *Government Gazette* under section 3.9 of the *Local Government Act 1995* (**Act**),[6]

on a particular subject matter. The standard of drafting of local laws is highly variable.

2.2 The Committee's approach to scrutinizing subsidiary legislation is discussed in pages 7 to 8 of the Committee's sixth Report (**Sixth Report**).[7] As is also indicated in that Report, local laws have required a more intense level of Committee scrutiny compared with instruments from government departments and agencies and professional bodies. Although constituting approximately 50 per cent of the instruments scrutinized by the Committee between June 28 2001 and August 9 2002, local laws consumed approximately 90 per cent of the Committee's scrutiny time.[8]

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5 Local governments are authorized to do this under section 3.8 of the *Local Government Act 1995.*

6 Local governments are authorized to do this under section 3.8 of the Act.

7 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002,* Report Number 6, March 2003.

8 *ibid*, p12.

3 STANDING ORDERS LOCAL LAW

3.1 Clause 2.4.13 of the *Shire of Mundaring Standing Orders Local Law* provides that councillors or committee members who are continuously disruptive during a meeting can be prevented from participating in debate for the remaining duration of a meeting:

> *(1) Where a member creates a disturbance or persists in any other conduct which disrupts a meeting, or refuses to make any explanation, retraction or apology required by the person presiding under this Local Law, the member is out of order and the person presiding may so declare.*
>
> *(2) Where the person presiding declares that a member is out of order the person presiding may direct that member to refrain from taking any further part in the meeting, other than by recording the member's vote and the member shall comply with such direction during the remainder of the meeting or until it is withdrawn whichever occurs earlier.* (emphasis added)

3.2 The WALGA *pro forma Standing Orders Local Law*[9] does not contain a clause that is equivalent to clause 2.4.13(2).

3.3 The Committee's concerns regarding the 'gagging' of councillors and committee members are discussed in depth at pages 18 to 23 and 27 to 32 in its fourth Report (**Fourth Report**).[10] In summary, the Committee's initial concerns were that clause 2.14.13(2) was potentially:

- inconsistent with the participatory role of councillors as indicated by section 2.10(d) of the Act;
- inconsistent with the scheme contemplated by the Act for excluding councillors and committee members from meetings; and
- an erosion of the implied freedom of political communication in the Commonwealth Constitution.

3.4 After considering the evidence presented by the Shire of Mundaring and again reviewing the local law, the Committee resolved to take no further action with respect to clause 2.14.13(2). The Committee acknowledges that the participatory role of

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9 This *pro forma* is a model local law that the Governor caused to be prepared and published in the *Government Gazette* on April 3 1998.

10 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in Relation to the City of Perth Code of Conduct Local Law,* Report Number 4, September 2002.

individual councillors must be balanced with the need to maintain order during meetings so that the council's business can be transacted effectively. The Committee also considered that it would be reasonable and appropriate for the presiding member to be able to prevent continually disruptive councillors or committee members from participating in debate (but preserving their right to vote) during the remainder of the meeting in order to ensure that the transaction of the council's business is not frustrated.

3.5 As a side issue, the Shire of Mundaring undertook to amend clause 2.4.13(1) by deleting the reference to members refusing to make "*…any explanation, retraction or apology…*" because it considered that such refusals in themselves would not necessarily disrupt a meeting. The Committee accepted this undertaking.

4 HEALTH LOCAL LAWS

Unreasonable Wording

4.1 During this reporting period, the Committee reviewed many health local laws[11] that, in the Committee's view, contained an unreasonable clause that is equivalent to the following example:

> *A person shall not place or cause to be placed in or on any premises, and an owner or occupier of premises shall not permit to remain in or on the premises -*
>
> *(a) any food, refuse or other waste matter which might attract rodents to the premises or which might afford harbourage for rodents; or*
>
> *(b) any food intended for birds or other animals,*
>
> *unless it is contained in a rodent proof receptacle or a compartment, which is kept effectively, protected against access by rodents.*

4.2 The Committee considered that the effect of this clause is to potentially prohibit both of the following situations:

- serving food for human consumption on plates or bowls, which are then placed on tables or bench tops or some other surface; and
- the usual method of feeding pets by means of placing pet food into a bowl or some other open container that can be accessed by the pet.

[11] For example, the *Shire of Boddington Health Local Laws 2003*, the *Shire of Dumbleyung's Health Local Laws 2001*, and the *Shire of Pingelly Health Local Laws 2003.*

4.3 The Committee suggested in each case that this prohibition was unreasonable and that the wording should be changed so as to regulate the storage of food, refuse or other waste matter. The Committee became aware that this problematic clause appears in many health local laws and is often inherited when adopting another local government's health local laws. The Committee notified the Minister for Health and on November 17 2003, he undertook to ensure that:

- the Department of Health would issue a circular to all local governments asking if their health local laws contain this clause or an equivalent clause;
- the Executive Director, Public Health would withhold consent to any proposed health local laws that contain this clause or an equivalent clause; and
- the power under section 343B of the *Health Act 1911* (the Governor's power to amend or repeal health local laws) would be used to amend the clause to read:

  No person shall store, or allow to be stored, on any premises, any food, refuse or other waste matter unless it is contained in a rodent proof receptacle or a compartment, which is kept effectively protected against access by rodents.

4.4 In a letter dated February 6 2004, the Minister for Health advised the Committee that the Department of Health was in the process of forwarding the circular to all local governments. The circular requested that all local governments 'fax-back' by March 5 2004 a notification of the clauses that required amendment.

Ouster Clauses

4.5 The Committee also became aware of certain ouster clauses[12] that appear in many health local laws. The undertaking given by the Minister for Health on November 17 2003 (referred to in paragraph 4.3) also relates to these ouster clauses. It is disappointing to continue to encounter clauses in local laws that purport to oust the tortious liability of the local government after local governments have previously been informed about the issues associated with those clauses. For example, unauthorized ouster clauses were discussed at pages 17 to 19 of the Sixth Report and at pages 9 to 10 of the Department of Local Government and Regional Development's Local Laws Circular No 10-2003.

[12] 'Ouster clauses' are so referred to because they seek to oust the jurisdiction of courts to hear claims or review decisions of inferior courts or tribunals.

4.6 The problematic ouster clauses in the health local laws provided that where the local government conducts work[13] to eradicate, control, or prevent the breeding of flies, mosquitoes or other pests, or clean, disinfect, disinfest, or sanitize premises or things:

> *The local government shall not be liable to pay compensation or damages of any kind to the…*[the person served with the notice] *…in relation to any action taken by the local government under this section.*

4.7 The Committee considered that these clauses and clauses that are equivalent to them:

- were void for inconsistency with section 9.56(4) of the Act pursuant to section 43(1) of the *Interpretation Act 1984*[14];
- removed a fundamental right to sue a local government for a cause of action recognized by the common law or statute when such clauses are not authorized by the *Health Act 1911* or any other Act;
- might also be void for inconsistency with section 259 of the *Health Act 1911* pursuant to section 342(5) of the *Health Act 1911* and section 43(1) of the *Interpretation Act 1984.* Section 259 of the *Health Act 1911* provides that the owner of any building, animal, or thing that is destroyed by direction of the Executive Director, Public Health or the local government under Part IX (Infectious Diseases) is entitled to compensation to the extent and subject to the conditions provided for in that section; and
- offended the Committee's terms of reference 6.6(a), (b), (d) and (f).[15]

4.8 As part of the Minister for Health's undertaking dated November 17 2003, the ouster clauses identified as a result of the Department of Health's circular will be amended to read:

> *The Local Government shall not be liable to pay compensation or damages of any kind to…*[the person served with the notice]*…in relation to any action taken by the Local Government under this section, except to the extent the person has suffered loss or damage because the action taken by the Local Government was negligent or in breach of its duty.*

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13 Work is conducted by the local government where the owner or occupier fails or neglects to do so after being issued a notice.

14 Section 43(1) of the *Interpretation Act 1984* states that: *"Subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency."*

15 Refer to the Committee's terms of reference on the inside cover of this Report.

5 BEEKEEPING LOCAL LAWS

Inconsistency with *Beekeepers Act 1963*

Shire of Roebourne Bee Keeping Local Law

5.1 Clause 4 of the *Shire of Roebourne Bee Keeping Local Law* prohibits the keeping of bees or beehives in the district without a valid permit issued by the Shire. It also provides exceptions to this prohibition. Clause 4 of this local law differs from clause 4 of the WALGA *pro forma Bee Keeping Local Law* in various ways. One difference is that clause 4 of this local law does not exempt, from the requirement to obtain a permit, those people who keep bees on their land for a continuous period of 8 weeks or less for the purpose of pollinating crops on that land. That is, residents who keep bees in this way and for this purpose will still be required to obtain a permit.

5.2 Clause 5(a) of this local law requires all people who apply for a permit to be registered as a beekeeper under section 8 of the *Beekeepers Act 1963*. The current cost of registration is $43 per annum. However, under section 8(1a) of that Act, people who keep bees for the purpose of pollinating crops are not required to be registered, as long as the bees are kept in an approved device[16] and the bees and the device are disposed of in a prescribed manner within 8 weeks after the person commenced keeping the bees.

5.3 The Committee considered that clause 4 of this local law (coupled with clause 5(a)) is inconsistent with the *Beekeepers Act 1963* in that it requires people who are not required to be registered beekeepers under that Act, to become so registered for the purpose of obtaining a permit under this local law. Such an inconsistency renders clause 4 inoperative pursuant to section 3.7 of the Act and section 43(1) of the *Interpretation Act 1984.*

5.4 In this case, the Committee accepted the Shire of Roebourne's explanation that the climatic conditions experienced in its district meant that no residents have ever or would ever require the use of bees to pollinate crops. However, the Shire undertook to review and amend its local law if the need to use bees in this way ever arose.

WALGA pro forma Bee Keeping Local Law

5.5 In the process of scrutinizing the *Shire of Roebourne Bee Keeping Local Law*, the Committee also reviewed the WALGA *pro forma Bee Keeping Local Law* in an effort to locate the source of the issues that were detected in the former instrument.

5.6 Clause 4(3)(a) of the *pro forma* provides an exemption from obtaining a beekeeping permit to people who are pollinating their crops with bees for 8 weeks or less, but only

[16] Approved by the Senior Apiculturist at the Department of Agriculture: section 4 of the *Beekeepers Act 1963.*

where this is done once in a 12-month period. Section 8(1a) of the *Beekeepers Act 1963* does not limit the number of times a beekeeper can undertake this activity without being registered. The WALGA was informed about this apparent inconsistency of the *pro forma* with the *Beekeepers Act 1963*.[17]

5.7 The Statutes (Repeals and Minor Amendments) Bill 1998 (**Bill**) was passed as the *Statutes (Repeals and Minor Amendments) Act 2000.* Among other things, that statute inserted sections 8(1a) and (1b) into the *Beekeepers Act 1963*. The Explanatory Notes to the Bill indicate that the purpose of those amendments to the *Beekeepers Act 1963* was to provide users of a pollination device known as the 'Bee Tube' with an exemption from the need to register as a beekeeper. The Explanatory Notes also indicate that an industry code of conduct for the use of Bee Tubes has been developed to help ensure that the exemption from registration is only available in the limited circumstances provided for in section 8(1a) of the *Beekeepers Act 1963*.

5.8 Having considered the wording of section 8(1a) and the Explanatory Notes for the Bill, the Committee could not infer that the Parliament had intended for the exemption to operate only where the Bee Tube is used once every 12 months. It was the Committee's view that the purpose of section 8(1a) is to exempt horticulturalists from the requirement to become registered under the *Beekeepers Act 1963*, but only if they keep bees in accordance with that section. In the Committee's view, it would be inconsistent for a local law to mandate registration under the *Beekeepers Act 1963*[18] (at the current annual fee of $43 per application) if a person satisfied the conditions in section 8(1a).

5.9 Accordingly, the Committee was concerned that a local law that adopted clauses 4(3) and 5(a) of the *pro forma* without amendment would be void for inconsistency with the *Beekeepers Act 1963* pursuant to section 3.7 of the Act and section 43(1) of the *Interpretation Act 1984*. It would also breach the Committee's term of reference 6.6(b).

5.10 The Committee notes that clause 4(3)(a) of the *pro forma* has since been amended by removing the 'once in a 12-month period' prohibition.

6 PARKING LOCAL LAWS

Ouster Clause

City of Stirling Parking Local Law 2003

6.1 Clause 2.25(2) of the *City of Stirling Parking Local Law 2003* stated that:

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17 Letter from the Committee to the WALGA, August 14 2003.

18 Registration as a beekeeper is a prerequisite for obtaining a beekeeping permit under clause 5(a) of the *pro forma* if a person keeps bees in a Bee Tube for up to 8 weeks on 2 or more occasions in 12 months.

A person is not entitled to make a claim, by way of damages or otherwise, against an authorised person or the City in respect of a vehicle removed or impounded in accordance with subclause (1).

6.2 The arguments against this type of clause (ouster clauses) have already been discussed at pages 17 to 19 of the Sixth Report and at pages 9 to 10 of the Department of Local Government and Regional Development's Local Laws Circular No 10-2003.

6.3 The Committee considered that this clause:

- was void for inconsistency with section 9.56(4) of the Act pursuant to section 3.7 of the Act and section 43(1) of the *Interpretation Act 1984*;
- removed a fundamental right to sue a local government for a cause of action recognized by the common law or statute when such clauses are not authorized to do so by the Act or any other Act; and
- offended the Committee's terms of reference 6.6(a), (b), (d) and (f).[19]

6.4 In this case, the Committee accepted a written undertaking from the City to delete as soon as possible the words "…*or the City.*…" from clause 2.25(2).

7 URBAN ENVIRONMENT AND NUISANCE LOCAL LAWS

Unauthorized Powers of Entry

Town of Kwinana Urban Environment and Nuisance Local Law

7.1 Clause 2.9(2) of the *Town of Kwinana Urban Environment and Nuisance Local Law* provides that an authorized person who forms the opinion that a person has fed a pigeon or bird so as to cause a nuisance may issue a notice to that person requiring them to clean up and properly dispose of any feed or waste products specified in the notice.

7.2 Clause 4.2 requires the owner or occupier of land to prevent the escape of dust or liquid waste from their land. Subclauses (2), (3) and (4) respectively, permit the Town to issue notices to require the owner or occupier to:

- prevent dust or liquid waste from escaping from the land;
- cease the activity that is causing dust or liquid waste to escape from the land; and

[19] Refer to the Committee's terms of reference on the inside cover of this Report.

- meet certain specified conditions in order to carry out activities that the Town believes will result in the escape of dust or liquid waste.

7.3 Clause 10.2 provides that where a person fails to comply with a notice, the Town may do the thing specified in the notice and recover the costs of doing so from the person served with the notice. This may require entry onto private land. The circumstances under which local governments can enter private land are discussed in the Committee's seventh Report.[20]

7.4 The cleaning up and disposal of bird feed or bird excrement to abate a nuisance is not listed in either Schedule 3.1 or 3.2 of the Act. Neither is the stopping or prevention of the escape of dust or liquid waste from land. Accordingly, the Committee considered that clause 10.2, coupled with clauses 2.9(2), 4.2(2), (3) and (4), is inconsistent with the Act to the extent that it authorizes the Town to enter onto private land for these purposes.

7.5 The Committee recognized that the Town of Kwinana would still like to have the power to issue notices to clean up and dispose of bird feed or bird excrement, or to stop or prevent the escape of dust or liquid waste from land. As such, the Committee had no issue with clauses 2.9(2), 4.2(2), (3) and (4). The Committee accepted a written undertaking from the Town to amend clause 10.2 to make it clear that the Town has no power to enter onto private land to carry out the activities specified in a notice issued under clauses 2.9(2), 4.2(2), (3) and (4).[21]

Graffiti Clauses

Town of Kwinana Urban Environment and Nuisance Local Law

7.6 Part 3 of the *Town of Kwinana Urban Environment and Nuisance Local Law* allows the Town to issue a notice to an owner and/or occupier to obliterate any graffiti that appears on any structure, fence, wall or building, and to specify in that notice, how and by when the graffiti must be obliterated. If the owner and/or occupier fails to comply with the notice, they commit an offence, which can attract a fine of $250 for the first offence, $500 for subsequent offences, or up to $5,000 if fully prosecuted. In addition to this, the Town can, pursuant to clause 10.2, also enter onto the private land to obliterate the graffiti at the owner or occupier's cost.

7.7 The removal of graffiti is not listed in either Schedule 3.1 or 3.2 of the Act. The Committee considered that clause 10.2, when coupled with Part 3, is inconsistent with,

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[20] Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in Relation to the Powers of Entry and Powers to make Local Laws that Affect Private Land under the Local Government Act 1995*, Report Number 7, May 2003.

[21] Unless the owner or occupier of the private land consents to the entry, the local government obtains a warrant for the entry, or there is some emergency that requires the entry: see sections 3.31, 3.33 and 3.34 of the Act.

and not authorized or contemplated by the Act. For reasons discussed at pages 22 to 23 of the Sixth Report, the Committee also considered Part 3 to be unreasonable; that is, not reasonably proportionate to the end sought to be achieved. The Committee accepted the Town's written undertaking to delete Part 3.

7.8 The Town of Kwinana was initially reluctant to give the requested undertakings because of the fact that it had copied the problematic clauses from other local laws. Research into those local laws indicated that while the Town did copy clauses, it had done so in a way that provided powers of entry that were not available in the other local laws. One exception was the graffiti clauses copied from the *City of Cockburn (Local Government Act) Local Laws 2000*. It is apparent that clauses 11.4 to 11.6 and 4.13 to 4.15 of that local law are problematic and were not commented on by the previous Committee at that time.

8 FENCING LOCAL LAWS

Giving Legislative Effect to Council Policies or Codes through Incorporation by Reference

8.1 This issue was dealt with in the Fourth Report at pages 36 to 49 and was also brought to the attention of all local governments at page 6 of the Department of Local Government and Regional Development's Local Laws Circular No 10-2003. The discussion in those references relate to a code of conduct; however, they apply equally to any form of code or policy devised by the local government and sought to be given legislative effect through incorporation into a local law by reference to the title of the code or policy.

Shire of Roebourne Local Laws Relating to Fencing

8.2 Clause 5 of the *Shire of Roebourne Local Laws Relating to Fencing* prescribes what is a 'sufficient fence' by referring to the requirements set out in the First, Second and Third Schedules of the local law. The First Schedule applies to fences on residential lots and the Second Schedule applies to fences on commercial or industrial lots. Both schedules stipulated that such fences:

> *…must comply with the Shire of Roebourne Planning Policy on Residential Frontage.*

8.3 Clause 6(3)(b) of the local law also stipulated that fences that are erected within the front set-back area of a residential lot:

> *…must…be in accordance with the applicable sections of the* ***Shire of Roebourne Planning Policy on Residential Frontage.***

8.4 Clause 16 of the local law provides that it is an offence to fail to comply with or contravene any provision of the local law, and such an offence is punishable by a fine of up to $5,000 or a modified penalty of $100. Essentially, the local law made it an offence to not comply with the *Shire of Roebourne Planning Policy on Residential Frontage* (**Planning Policy**).

8.5 The effect of the First and Second Schedules and clause 6(3)(b) was that the Planning Policy was incorporated by reference and became a part of the local law. Without this incorporation, the Planning Policy would have no legislative effect and would not be enforceable. The objective of the Planning Policy appears to be to provide guidance to architects, designers, builders and property owners in preparing building licence applications for developments, including fences. The Planning Policy was no longer an administrative document that was to be used to guide decision-makers. The local law now sought to enforce its requirements through the imposition of penalties.

8.6 Section 3.8(1) of the Act expressly authorizes a local law to adopt the text of, among other things:

> *(c) any code, rules, specifications, or standard issued by the Standards Association of Australia or by such other body as is specified in the local law.*

8.7 In the Committee's view, this authorization only extends to codes and other like instruments that are made by bodies that are external to the Shire.[22] The Committee considered that this method of adopting the Planning Policy was therefore, not authorized or contemplated by the Act.

8.8 By incorporating the Planning Policy into the local law, the Shire of Roebourne had in effect sub-delegated its local law making power to a simple majority of the council. The Shire had given itself the ability to amend or repeal the Planning Policy or make a new Planning Policy (and therefore, amend the local law) in circumstances different to those required when making, amending or repealing a local law under the Act; that is, by a special majority[23] of the council.[24] The requirements for a 'sufficient' residential and commercial or industrial fence could, to some extent, be changed by a simple majority of the council amending or repealing the Planning Policy.

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22 See pages 39 to 40 of the Fourth Report.

23 As defined in section 1.10 in the Act.

24 Section 3.12 of the Act.

8.9 The Shire is not permitted to sub-delegate its already delegated local law making power to another body, or a differently constituted council, unless authorized to do so by the Act.[25]

8.10 In making, amending or repealing the Planning Policy:

- the mandatory requirements of section 3.12 of the Act,[26] including public notification and consultation and publication in the *Government Gazette*; and
- the requirements of sections 41 (publication in the *Government Gazette*) and 42 (tabling in Parliament) of the *Interpretation Act 1984*,

would be avoided because the Planning Policy, as a document in itself, would not be subject to those requirements.[27]

8.11 The effect of adopting the Planning Policy by reference is that the requirements for a 'sufficient' residential and commercial or industrial fence that are provided for in that policy could be unseen and never scrutinized by the Department of Local Government and Regional Development or the Committee. Amendments to, or repeals of, the Planning Policy (meaning that the local law is substantively amended) would also escape the scrutiny of that Department and the Committee.

8.12 The Committee considered that it was not the intention of Parliament for the procedures contained in section 3.12 of the Act and sections 41 and 42 of the *Interpretation Act 1984* to be avoided. Any local law that attempts to evade scrutiny by the Department of Local Government and Regional Development or the Parliament, via the Committee, is not authorized by, and is inconsistent with, the Act and the *Interpretation Act 1984*, and invalid to the extent of that inconsistency.

8.13 In summary, the Committee's view of clauses 5 and 6(3)(b) of the local law was that they were:

- not authorized or contemplated by the Act;
- inconsistent with the Act because they purported to allow an internal policy document with legislative effect to avoid the mandatory local law making requirements of section 3.12 of the Act;

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25 For example, see *Hawke's Bay Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board* [1961] NZLR 218; *Turner v Owen* (1990) 96 ALR 119; pages 43 to 45 of the Fourth Report.

26 Letter of opinion from the Crown Solicitor's Office to Department of Local Government and Regional Development, January 31 2002.

27 See pages 45 to 49 of the Fourth Report.

- inconsistent with the *Interpretation Act 1984* because they purported to allow an internal policy document that was incorporated into a local law to avoid the requirements of sections 41 and 42; and

- were in breach of the Committee's term of reference 6.6(a).

8.14 The Committee received a written undertaking from the Shire of Roebourne to remove all references to the Planning Policy in the local law.

Inconsistency with the *Dividing Fences Act 1961*

WALGA pro forma Local Laws Relating to Fencing

8.15 In the process of scrutinizing the *Shire of Roebourne Local Laws Relating to Fencing*, the Committee also reviewed the *WALGA pro forma Local Laws Relating to Fencing* in an effort to locate the source of the issues that were detected in the former instrument.

8.16 Section 5 of the *Dividing Fences Act 1961* defines 'sufficient fence' as meaning:

> *(a) any fence prescribed by a local law as a sufficient fence for the part of the local government district in which the dividing fence or boundary fence is, or is to be, erected; or*
>
> *(b) any fence of the description and quality agreed upon by the parties concerned which does not fail to comply with any local law referred to in paragraph (a),* (emphasis added)

8.17 However, clause 6(1) of the *pro forma* provides that:

> *Unless by agreement between the owners of adjoining properties, a person shall not erect a dividing fence or a boundary fence that is not a sufficient fence.* (emphasis added)

8.18 Contrary to section 5 of the *Dividing Fences Act 1961*, clause 6(1) of the *pro forma* implies that as long as the adjoining property owners agree to the type of fence they want to erect, they are not required to erect a 'sufficient fence'.

8.19 The First and Second Schedules of the *pro forma* prescribe the requirements for a 'sufficient fence' on residential and commercial or industrial lots, respectively. Clause 11(1) of the *pro forma* lists the types of materials that a person must use to construct a fence on such lots. The materials listed in clause 11(1) included "*…wrought iron, tubular steel framed…or…a material approved by the Building Surveyor.*" However, these materials are not listed in either the First or Second Schedule.

8.20 The Committee was concerned that if a local government based a local law on the *pro forma* without amendment, clause 11(1) of the local law would be inconsistent with the First and Second Schedules of the local law, and therefore inconsistent with section 5 of the *Dividing Fences Act 1961*. Clause 11(1) of the local law would also be invalid to the extent of that inconsistency pursuant to section 3.7 of the Act and section 43(1) of the *Interpretation Act 1984.*

8.21 The Committee has notified the WALGA of these issues. The WALGA has indicated that clause 6(1) of the *pro forma* will be amended to emphasize the fact that adjoining property owners can agree to build a fence that exceeds the requirements of a 'sufficient fence', and that clause 11(1) will need some adjustment.[28]

9 LACK OF ENACTING OR CONCLUDING FORMULA

9.1 From time to time, the Committee encounters local laws that do not have enacting or concluding formulae. While this is not strictly fatal to the validity of the local law, the Committee considers that it is good drafting practice to include such formulae. For example, the concluding formula is usually framed in the following way:

> *Made at a meeting of the Council of the…held on…. The Common Seal of the…was hereunto affixed in the presence of -*
>
> *…President/Mayor*
>
> *…Chief Executive Officer*
>
> *Dated…*

9.2 The Committee observes a qualification to the preceding paragraph. If, in its own standing orders local law, a local government adopts clause 19.1(3) of the Governor's model *Standing Orders Local Law*[29] without amendment, it would appear that the common seal should be fixed to every one of its local laws. Clause 19.1(3) of the Governor's model provides as follows:

> *The common seal of the local government is to be affixed to any local law which is made by the local government.*

9.3 In that situation, if the common seal is not affixed to a particular local law made by the local government, the Committee considers that the validity of that local law may be questioned. This situation occurred with the *Shire of Serpentine-Jarrahdale Standing Orders Local Law 2002.* The Committee draws this matter to the attention of all local governments.

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[28] Letter from the WALGA to the Committee, October 30 2003.

[29] The Governor's model *Standing Orders Local Law* was gazetted on April 3 1998 and is also used by the WALGA as its *pro forma Standing Orders Local Law.*

10 INCORPORATION BY REFERENCE OF AUSTRALIAN STANDARDS

10.1 During this reporting period, the Committee has encountered many local laws that adopt Australian Standards or other codes or rules that are formed by third party organizations. However, most of those local laws fail to specify whether the standard is being adopted 'as it existed at the time when the local law was made' or 'as amended from time to time'.

10.2 Where a standard is adopted 'as it existed when the local law was made', the local government would need to amend the local law each time the standard was amended in order to keep its local law up to date. If the standard was adopted 'as amended from time to time', any subsequent changes to the standard would automatically be incorporated into the local law.

10.3 If the adopting clause does not indicate that the standard is being adopted 'as amended from time to time', it is then open to debate which type of adoption applies. Section 16(1) of the *Interpretation Act 1984* provides that a reference to a 'written law', which includes subsidiary legislation but not standards *"…shall be deemed to include a reference to such written law as it may from time to time be amended."* That is, section 16(1) does not apply to standards that are incorporated by a local law. In order to clearly adopt a standard 'as amended from time to time', express words to that effect should be used to avoid any uncertainty.

10.4 Local governments that wish to adopt the most current standards should be aware that they must keep informed of any developments in the standards that they have adopted in their local laws. Australian Standards are often denoted using numbers such as, for example, AS/NZS 3666.2-1995. These numbers change slightly when the standard is replaced with an updated one, for example, AS/NZS 3666.2-2002. When this replacement occurs, the local law should be amended to reflect it, unless for some reason the local government wishes to keep the outdated standard.

11 DRAFTING ERRORS

11.1 The Committee continues to regularly encounter drafting errors. Where drafting errors are clearly typographical errors or minor in nature, the Committee will generally request a written undertaking to correct the errors when the local government next reviews the local law.

11.2 Most drafting errors occur when clauses are either deleted or inserted and the local governments then fail to renumber the clauses. Even where proper renumbering occurs, the local governments then fail to amend references to the renumbered clauses. Spelling mistakes and typographical errors are common but usually do not affect the meaning of clauses.

WALGA pro forma Standing Orders Local Law

11.3 Clause 3.4(1)(g) of the *pro forma* provides that petitions must be "*…in the form prescribed by the Act and Local Government (Constitution) Regulations 1996…*", but the correct citation for those regulations is '*Local Government (Constitution) Regulations 1998*' (emphasis added). The Committee encountered this error when it reviewed the *pro forma* in an effort to locate the source of the same error found in various standing orders local laws that had been published in the *Government Gazette*.

Shire of Dumbleyung's Health Local Laws 2001

11.4 The *Shire of Dumbleyung's Health Local Laws 2001* was gazetted on July 25 2003 and adopted the *Shire of Leonora Health Local Laws 1999*. A new clause 5.3.3(3)(vi) had so many words missing that it did not make sense. It read:

> *The minimum floor area of each stall shall be not less than 28 square metres vertically or 4 metres horizontally;*

11.5 It should have read:

> *The minimum floor area of each stall shall be not less than 28 square metres and walls shall not be less than 3 metres vertically or 4 metres horizontally;* (emphasis added)

11.6 The Committee requested and received a written undertaking from the Shire of Dumbleyung that various drafting errors, including the one mentioned above, would be amended when the local law was next reviewed.

Town of Claremont Amendments to Activities on Thoroughfares and Public Places Local Law

11.7 As the title suggests, this local law sought to amend the Town of Claremont's *Activities on Thoroughfares and Public Places Local Law*. This local law incorrectly referred to the date of gazettal of the principal local law as May 27 2003. The correct date was April 17 2000. Clause 1.1 of the principal local law specified that the principal local law could be cited as the "*…Activities on Thoroughfares and Public Places Local Law*", so this local law had correctly cited the principal local law.[30] However, the date of publication should be amended so as to provide accurate information. The Committee requested and received a written undertaking from the Town of Claremont that this error would be amended as soon as possible.

[30] Section 26(1)(a) of the *Interpretation Act 1984* provides that this sort of citation is sufficient.

Shire of Boddington Health Local Laws 2003

11.8 The *Shire of Boddington Health Local Laws 2003*, among other things, purported to repeal previously adopted health local laws. One such law was referred to as:

> *(4) The Health Local Laws adopted by the Shire of Boddington on 21 December 1966 and published in the Government Gazette on 13 March 1967…*

11.9 The correct publication date for that local law is March 16 1967. The effective result of this drafting error was that the Shire had failed to repeal those particular health local laws because they were not correctly cited. The Committee requested and received a written undertaking from the Shire of Boddington that this error would be amended when the local law was next reviewed.

12 NON-COMPLIANCE WITH OR IGNORANCE OF EXPLANATORY MEMORANDA DIRECTIONS

12.1 Section 3.12(7) of the Act grants the Minister for Local Government and Regional Development the power to issue directions to local governments requiring them to provide to the Committee, as a delegate of the Parliament, copies of local laws that they have made and any explanatory material relating to them. The current directions are contained in the *Local Laws - Explanatory Memoranda Directions 2002* issued by Hon Tom Stephens MLC on August 27 2002 and can be accessed through the Department of Local Government and Regional Development's website at www.dlgrd.wa.gov.au.

12.2 One of the main problems faced by the Committee is the late receipt of the explanatory material and copies of the gazetted local laws that are required to be provided under the Minister's directions. The directions indicate that the documents must be provided to the Committee 'immediately' after the local law has been published in the *Government Gazette.* However, the Committee will accept explanatory material and copies of local laws that are received within 10 working days of gazettal.

12.3 The Committee operates under strict time limits governed by the *Interpretation Act 1984* and the Standing Orders of the Legislative Council. Failure or delay in providing the explanatory material and copies of the gazetted local law places the Committee under unnecessary pressure and significantly hampers its scrutiny role. As a result the Committee may recommend to Parliament that the local law be disallowed for non-compliance with the Minister's directions regardless of whether the content offends any of its terms of reference.

12.4 The Committee has often found that when the explanatory material and copies of a local law are provided a few weeks overdue, the responsible officer is either

inexperienced or has been away from the office and has not been substituted in the meantime. However, there are some exceptions.

12.5 One particular local law was gazetted on May 30 2003 but the Committee was not provided with an explanatory memorandum until August 15 2003; that is, 2 ½ months after the 10 working day period that is permitted by the Committee. The Committee's staff contacted the relevant officer numerous times about this issue and advised of the implications of failing to provide an explanatory memorandum. The officer did not appear to be aware of the Minister's directions and despite being referred to those directions, insisted that the local government had already complied with them.

12.6 The Committee has also found that some local governments continue to ignore the following requirements of the Minister's directions:

> *4.3 The documentation and other information to be supplied to the Delegated Legislation Committee is to include:*
>
> …
>
> *(b) if the local law is an amending local law, one electronic copy of the principal local law with all amendments consolidated to a date immediately prior to* [the commencement of] *the amendment local law* [that is] *being submitted for scrutiny;*
>
> *(c) if the local law uses a Western Australian Local Government Association (WALGA) pro forma as a template the pro forma must be identified by name and page number in the relevant edition of the WALGA Local Laws Manual and the local government must identify to what extent, if any, the local law differs from the text contained in the WALGA pro forma;*
>
> *(d) if the local law adopts the text of the local law of another local government (gazettal by reference) and the local law text adopted is based on a WALGA pro forma, the local government must identify to what extent, if any, the adopted text differs from the text contained in the WALGA pro forma;*
>
> …

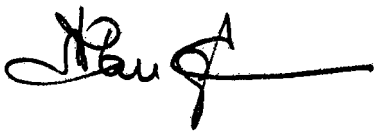
(f) a completed checklist (refer to 4.2.5) confirming that all procedural matters that are pre-requisites to the valid making of the local law have been met.

12.7 The Committee draws these practice deficiencies to the attention of local governments and emphasizes the importance of compliance with the Minister's directions.

13 CONCLUSION

13.1 The drafting and procedural errors that are discussed here represent only a sample of the types of errors encountered by the Committee during this reporting period. In the Committee's view, errors of this sort appear to stem from a combination of a lack of resources and local law making experience on the part of some of the drafters.

13.2 The substantive issues that have been discussed in this Report demonstrate that several local governments continue to have a fundamental misunderstanding and lack of knowledge concerning the scope of their local law making powers. In the Committee's view, this situation appears to have arisen from a misconception held by local governments that they are 'sovereign entities' that have plenary law making powers that are not subject to the 'interference' of Parliament or its committees. The Committee is aware of this problem and remains hopeful that reports of this nature will help to correct that misconception.



Hon Ray Halligan MLC
Deputy Chairman

Date: April 19 2004