



THIRTY-EIGHTH PARLIAMENT

REPORT 54

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***CITY OF BAYSWATER STANDING ORDERS LOCAL
LAW 2012***

Presented by Mr Paul Miles MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

September 2012

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed

28 June 2001

Terms of Reference

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

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause -
- “**adverse effect**” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “**instrument**” means -
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “**subsidiary legislation**” has the meaning given to it by section 5 of the *Interpretation Act 1984*.

Members as at the time of this inquiry

Mr Joe Francis MLA (Chairman) (until 14/08/12)	Mr Andrew Waddell MLA
Mr Paul Miles MLA (Chairman) (from 20/08/12)	Ms Janine Freeman MLA
Mr Vincent Catania MLA (from 16/08/12)	Hon Helen Bullock MLC
Hon Sally Talbot MLC (Deputy Chair)	Hon Jim Chown MLC
Hon Alyssa Hayden MLC	

Staff as at the time of this inquiry

Suzanne Veletta (Advisory Officer)	Anne Turner (Advisory Officer (Legal))
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CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS	i
EXECUTIVE SUMMARY.....	i
RECOMMENDATION.....	ii
REPORT	1
1 REFERRAL TO THE COMMITTEE.....	1
2 BACKGROUND	1
3 SCRUTINY OF THE PROCEDURE FOR MAKING THE LOCAL LAW	1
4 NON-COMPLIANCE WITH SECTION 3.12 OF THE <i>LOCAL GOVERNMENT ACT 1995</i>	2
Disallowance of an invalid local law - the Committee’s position.....	2
5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW	4
6 REVIEW OF SECTION 3.12 OF THE <i>LOCAL GOVERNMENT ACT 1995</i>	4
7 PROBLEMATIC CLAUSE 8.5.....	6
8 CONCLUSIONS.....	7
Term of Reference 3.6(a).....	7
Consequences of disallowance.....	7
Problematic clause	7
9 RECOMMENDATION	8
APPENDIX 1 SECTION 3.12 OF THE <i>LOCAL GOVERNMENT ACT 1995</i>	9
APPENDIX 2 RESPONSE FROM THE CITY OF BAYSWATER	11

EXECUTIVE SUMMARY AND RECOMMENDATION FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE *CITY OF BAYSWATER STANDING ORDERS LOCAL LAW 2012*

REPORT

EXECUTIVE SUMMARY

- 1 Section 3.12(1) of the *Local Government Act 1995* (**Act**) states that in making a local law a local government is to follow the procedure in section 3.12, in the sequence in which it is described.
- 2 The Joint Standing Committee on Delegated Legislation (**Committee**) has identified that the City of Bayswater did not follow the correct procedure described in the Act when it made its *City of Bayswater Standing Orders Local Law 2012* (**Local Law**).
- 3 The City of Bayswater failed to follow the sequential steps outlined in section 3.12(3)(b) of the Act, which has resulted in the Local Law being invalid. The Local Law is not authorised by the Act and therefore offends the Committee's *Term of Reference* 3.6(a).
- 4 On 16 July 2012, the Minister for Local Government stated that he agreed with the Committee's position that local laws should be disallowed where local governments have failed to comply with the local law making process.¹
- 5 The Committee recommends the House disallow the City of Bayswater's Local Law.
- 6 The Committee noted that on 22 June 2012, the Director General of the Department of Local Government advised all local governments by *Circular* of the Committee's strict approach to compliance with section 3.12 of the Act.² The Director General further advised local governments that following disallowance of the:
- *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*,³ and
 - *Town of Kwinana Extractive Industries Local Law 2011*,⁴

¹ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

² Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012.

the *Statutory Procedures Checklist* has been updated to “*remove any ambiguity as to the order in which the law making process must occur*”.⁵ The Committee welcomes this assistance to local governments.

RECOMMENDATION

7 The Recommendation is as it appears in the text at the page number indicated:

Page 8

Recommendation 1: The Committee recommends that the *City of Bayswater Standing Orders Local Law 2012* be disallowed.

⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

⁵ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE *CITY OF BAYSWATER STANDING ORDERS LOCAL LAW 2012*

REPORT

1 REFERRAL TO THE COMMITTEE

- 1.1 The *City of Bayswater Standing Orders Local Law 2012 (Local Law)* falls within the definition of ‘Instrument’ in the *Terms of Reference* of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Local Law was referred to the Committee upon publication in the *Western Australian Government Gazette*. Its full text is publicly available from the State Law Publisher’s website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.⁶

2 BACKGROUND

- 2.1 The City of Bayswater (**City**) resolved to commence the process of making a Standing Orders Local Law 2012 at its meeting on 14 December 2010.
- 2.2 The procedure for making a local law is outlined in section 3.12 of the *Local Government Act 1995 (Act)* and is replicated at **Appendix 1**.

3 SCRUTINY OF THE PROCEDURE FOR MAKING THE LOCAL LAW

- 3.1 The Committee first scrutinised the Local Law on 18 June 2012. The City provided a *Statutory Procedures Checklist* for the Instrument which indicated non-compliance with section 3.12(3)(b) of the Act. That sub-section requires that:

The local government is to –

... as soon as the [Statewide public] notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.

- 3.2 According to sections 1.7 and 1.8 of the Act, ‘Statewide public notice’ requires a notice to be published in a newspaper circulating generally throughout the State, exhibition of the notice to the public on a notice board at the local government’s offices and to the public at every local government library in the district. All three

⁶ The Local Law was published in the *Western Australian Government Gazette* on 22 May 2012, No.80.

elements of Statewide public notice must be completed in order for the notice to be effective.

- 3.3 The *Statutory Procedures Checklist* for the City's Local Law indicated that Statewide public notice was published in *The West Australian* on 29 January 2012 with the Minister given a copy of the proposed Instrument and a copy of the Statewide public notice on 21 January 2012.
- 3.4 The Committee sought confirmation of the accuracy of the information in the *Statutory Procedures Checklist*. On 22 June 2012, the City confirmed that the checklist was correct; that is, the City sent copies of the Statewide public notice and the proposed local law to the Minister on 21 January 2012 and then gave Statewide public notice on 29 January 2011. However, the Act requires that the City should have proceeded in the reverse manner; that is, Statewide public notice should have been given first (pursuant to 3.12(3)(a)) and then the Minister given a copy of the Statewide public notice and the proposed local law, pursuant to 3.12(3)(b).
- 3.5 As a result of this error, the procedure in section 3.12(3) of the Act for the Local Law has not been sequentially followed. This procedural defect has resulted in the Committee forming a view that the Local Law is unauthorised by the Act because the wording of section 3.12(3)(b) expressly uses the words "*as soon as the* [Statewide public] *notice is given*", which requires notification be given to the Minister only after the Statewide public notices have been given.
- 3.6 A copy of the City's response to the Committee's letter regarding the Local Law is replicated at **Appendix 2**.

4 NON-COMPLIANCE WITH SECTION 3.12 OF THE LOCAL GOVERNMENT ACT 1995

Disallowance of an invalid local law - the Committee's position

- 4.1 The Committee has previously stated its position on the status of invalid local laws and the prospect of disallowance on six other occasions in its:
- 42nd report: *Town of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and *Town of Koorda Standing Orders Local Law 2009*;⁷
 - 45th Report: *Shire of Kellerberrin Dogs Local Law*;⁸

⁷ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 42, Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2010. These two local laws raised the same issue for the Committee in that both Instruments were gazetted in error. In each case, the Instrument gazetted was not the one adopted by the Shire Council or subject to the procedure set out under section 3.12 of the *Local Government Act 1995*.

- 47th Report: *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;⁹
- 48th Report: *Town of Kwinana Extractive Industries Local Law 2011*;¹⁰
- 51st Report: *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*;¹¹ and
- 53rd Report: *Mindarie Regional Council Standing Orders Amendment Local Law 2012*.¹²

4.2 This Local Law raises the same issues in relation to the effect of not complying with the procedure in section 3.12 of the Act and the Committee notes that a failure to comply with the requirements of the section will result in a local law being found to be invalid.

4.3 As stated previously, an Instrument stands referred to the Committee at the time of gazettal. Upon the tabling of a local law, there is an Instrument which may be subject to disallowance and the Parliament has the power to disallow a local law tabled before it.¹³

⁸ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 45, Shire of Kellerberrin Dogs Local Law*, 3 November 2011. The Committee formed the view that the local law had been invalidly made, based on non-compliance with sections 3.12(5) and (6) of the *Local Government Act 1995*. The Committee recommended that the Executive Council advise the Governor to invoke section 3.17 of the *Local Government Act 1995* to repeal the local law. This course of action was chosen because due to an administrative error, a notice of motion to disallow was not moved in the Legislative Council on the last date for disallowance: 27 September 2011.

⁹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and a then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

¹⁰ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister six days before Statewide public notice was given.

¹¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 51, Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister one day before Statewide public notice was given.

¹² Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 53, Mindarie Regional Council Standing Orders Amendment Local Law 2012*, 13 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that the Minister was never given a copy of the Statewide public notice contrary to section 3.12(3)(b) of the Act.

¹³ Section 42 of the *Interpretation Act 1984*.

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

5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW

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

3.12 Procedure for making local laws

In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.

[Committee emphasis]

- 5.2 If the steps set out in section 3.12 are not followed exactly in the order in which they are outlined, then the requirements of the Act have not been met and the local law is consequentially invalid.
- 5.3 Long-standing advice from the then Crown Solicitor's Office (now State Solicitor's Office) in January 2002 is that the procedure in section 3.12 is mandatory. A local law which does not follow the process in the order in which it is described there will be invalid.¹⁴
- 5.4 Therefore, as the process outlined in section 3.12(3)(b) of the Act has not been followed correctly, the Committee has formed the view that the Local Law is invalid and capable of disallowance.
- 5.5 On 16 July 2012, the Minister for Local Government stated that he agreed with the Committee's position that local laws should be disallowed where local governments have failed to comply with the local law making process.¹⁵

6 REVIEW OF SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

- 6.1 The Committee notes that this is the seventh occasion since September 2010 that the Committee has scrutinised a local law which has not correctly followed the mandatory sequential procedure prescribed in section 3.12(2) of the Act.
- 6.2 The Committee is concerned that the overly prescriptive nature of section 3.12(2) may be the cause of local laws being invalid. Prior to the publication of Circular Number 16-2012 on 22 June 2012, local governments were clearly unaware of the legal

¹⁴ That longstanding advice dated 31 January 2002 is replicated in Appendix 4 to Report 42, Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 42, Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2010.

¹⁵ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

consequences of not complying exactly with all of the steps in section 3.12(2) in the order in which they are prescribed.

- 6.3 Sequential errors result in significant resources and rate payer money being expended by local governments to make laws which are ultimately found to be invalid and of no legal effect. While the Committee is sympathetic to the intention of local governments when they fail to comply with the process in section 3.12(2), the Committee's *Terms of Reference* oblige it to investigate when an Instrument of subsidiary legislation is not made according to the requirements of its empowering statute.
- 6.4 The Committee sees a solution to this discord between a strict legal interpretation of the words of section 3.12(2) and the practical impact on the many local governments in the State which may not be aware of the effect of non-compliance with section 3.12(2) of the Act.
- 6.5 On 16 July 2012, the Minister for Local Government advised that following disallowance of the *Town of Kwinana Extractive Industries Local Law 2011*¹⁶ and the *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*¹⁷, he will review section 3.12 of the Act "in the future and the possibility of further amendment will be considered."¹⁸
- 6.6 On 22 June 2012, the Director General of the Department of Local Government advised all local governments by *Circular* of the Committee's strict approach to compliance with section 3.12.¹⁹ The Director General further advised that following disallowance of the:
- *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*,²⁰ and
 - *Town of Kwinana Extractive Industries Local Law 2011*,²¹

¹⁶ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

¹⁷ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and a then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

¹⁸ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

¹⁹ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

²⁰ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and a then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

the *Statutory Procedures Checklist* has been updated to “remove any ambiguity as to the order in which the law making process must occur”.²² The Committee welcomes this assistance to local governments.

7 PROBLEMATIC CLAUSE 8.5

- 7.1 Despite the Local Law being invalid, the Committee scrutinised the substantive text of the Instrument. The Committee noted that clause 8.5 is problematic. It deals with continued breaches of order by members. It states:

8.5 Continued breach of order

If a member—

(a) persists in any conduct that the presiding member had ruled is out of order; or

(b) fails or refuses to comply with a direction from the presiding member (such as a direction under clause 7.7(2)(b), 7.14 or 8.4(3)(b)),

the presiding member may direct the member to refrain from taking any further part in that meeting, other than by voting, and the member must comply with that direction. (Committee emphasis).

- 7.2 The Committee has scrutinised Standing Orders Local Laws with identical clauses in the past. The Committee’s position on such clauses is that they effectively silence elected members by denying them the opportunity to fully participate in Council meetings. It also confers on the presiding member a subjective power to deem when members’ conduct warrants them to be directed to refrain from taking any further part in the meeting.

- 7.3 This outcome is inconsistent with section 3.1 of the Act which provides that the general function of a local government is to provide for the good government of persons in the district, as it undermines the fundamental principles of democratic local government. There is no power in either the Act or the *Local Government (Administration) Regulations 1996* for presiding persons to direct members to refrain from taking part in any part of meetings. Indeed, section 2.10 of the Act expressly states that the role of a councillor is to participate in the local government decision

²¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister six days before Statewide public notice was given.

²² Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

making processes at council and committee meetings. As such, this clause appears to breach section 2.10 of the Act.

7.4 Similar clauses have been considered by the Committee in standing orders local laws of other local governments. In those cases, the Committee obtained undertakings from those local governments to either repeal the problematic clause or amend it by deleting the words “that meeting” after the words “part in” and inserting the words “the debate of the item”.

7.5 The Committee is stating its position in relation to clause 8.5 for the benefit of the City of Bayswater in the event that it re-commences the process of making a new standing orders local law.

8 CONCLUSIONS

Term of Reference 3.6(a)

8.1 The Committee has concluded that the Local Law offends its *Term of Reference 3.6(a)* on the basis of non-compliance with a mandatory requirement in section 3.12(3)(b) of the Act. The Committee has therefore resolved to recommend that the House disallow the Local Law as it is of the view that it is invalid and not authorised by the Act.

8.2 The Committee has also concluded that there is an avenue for ensuring that this type of non-compliance (or more appropriately termed, ‘substantial compliance’) should not be a barrier to local laws being authorised under the Act.

Consequences of disallowance

8.3 As outlined in previous reports, the Committee notes that a number of benefits exist in recommending the disallowance of invalid instruments, which include ensuring that invalid laws are quickly removed from the public record and reducing the risk of public misinformation.

8.4 Disallowance of the Local Law will revive the previous City of Bayswater Standing Orders Local Law published in the *Gazette* on 11 January 2001.

Problematic clause

8.5 The Committee’s conclusion is that clause 8.5 of the Local Law is in breach of section 2.10 of the Act and should be amended or deleted.

8.1 The Committee has included its position on this clause in this Report for the benefit of the City of Bayswater in the event that it re-commences the process of making a new standing orders local law.

9 RECOMMENDATION

Recommendation 1: The Committee recommends that the *City of Bayswater Standing Orders Local Law 2012* be disallowed.



**Mr Paul Miles MLA
Chairman**

13 September 2012

APPENDIX 1

SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

3.12. Procedure for making local laws

(1) In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.

(2) At a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner.

(3) The local government is to —

(a) give Statewide public notice stating that —

(i) the local government proposes to make a local law the purpose and effect of which is summarized in the notice;

(ii) a copy of the proposed local law may be inspected or obtained at any place specified in the notice; and

(iii) submissions about the proposed local law may be made to the local government before a day to be specified in the notice, being a day that is not less than 6 weeks after the notice is given;

(b) as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister; and

(c) provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.

(3a) A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.

(4) After the last day for submissions, the local government is to consider any submissions made and may make the local law as proposed or make a local law* that is not significantly different from what was proposed.*

** Absolute majority required.*

(5) After making the local law, the local government is to publish it in the Gazette and give a copy of it to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.

(6) After the local law has been published in the Gazette the local government is to give local public notice —

(a) stating the title of the local law;

(b) summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and

(c) advising that copies of the local law may be inspected or obtained from the local government's office.

(7) The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.

(8) In this section —

making in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.

APPENDIX 2

RESPONSE FROM THE CITY OF BAYSWATER



Francesca Lefante
Chief Executive Officer

FROM THE OFFICE OF THE CHIEF EXECUTIVE OFFICER
CITY OF BAYSWATER



22 June 2012

Mr Joe Francis MLA
Chair Delegated Legislation Committee
Parliament House
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Dear Mr Francis

CITY OF BAYSWATER STANDING ORDERS LOCAL LAW 2012

Further to your letter of 19 June 2012 in regard to the City of Bayswater Standing Orders Local Law 2012 and your question concerning the accuracy of the *Statutory Procedures Checklist* provided to the Joint Standing Committee on Delegated Legislation, I can confirm that the checklist provided is correct.

If you require further information please contact the City of Bayswater's Governance Officer, Ms Vanessa Davidson, on 9270 4113 or via email at vanessa.davidson@bayswater.wa.gov.au.

Yours sincerely

FRANCESCA LEFANTE
CHIEF EXECUTIVE OFFICER

The Garden City - Quality Lifestyle