

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

'LOCAL LAWS'

SUMMARY OF PRESENTATION GIVEN AT WALGA CONFERENCE, PERTH EXHIBITION AND ENTERTAINMENT CENTRE, FRIDAY 9 AUGUST 2019

**PRESENTED BY
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This document is intended to provide general information about the Joint Standing Committee on Delegated Legislation, the Committee's process and points of consideration. This document does not constitute legal advice. Local governments should obtain independent legal advice when required.

1 THE COMMITTEE

What is Delegated Legislation?

- 1.1 Delegated legislation is a form of legislation made by persons or bodies other than Parliament. These persons/bodies have been given the authority to make legislation by an Act of Parliament.
- 1.2 Acts made by Parliament usually provide a general framework rather than the specific detail of when, where and how the legislation might be applied. Delegated law prescribes matters such as technical details or matters which may require regular updates or change.
- 1.3 Common examples of delegated legislation include:
 - Regulations
 - Rules
 - Local laws
 - Orders
 - Fishery Management Plans
 - Codes
 - Court Rules
 - Planning Schemes
- 1.4 Section 5 of the *Local government Act 1995* (WA) authorises local governments to make local laws:

prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.'
- 1.5 Local laws usually cover issues such as parking, the keeping of animals, waste, bush fire brigades, council meetings and public places.
- 1.6 Delegated law has the same power and force as any other law in Australia.
- 1.7 To ensure that Parliament retains effective oversight of delegated legislation, most delegated legislation can be disallowed by the Parliament.

Committee's Role

- 1.8 The Joint Standing Committee on Delegated Legislation is responsible for examining, on behalf of Parliament, each disallowable instrument of delegated legislation that is tabled in Parliament.
- 1.9 The Committee determines whether the instruments are beyond the scope of the delegated power or are otherwise in breach of the Committee's Terms of Reference.
- 1.10 The Committee's Terms of Reference require the Committee to consider whether the instrument:
 - is within power

- has any unintended effect on any person’s existing rights or interests
- provides an effective mechanism for the review of administrative decisions
- contains only matter that is appropriate for subsidiary legislation.

- 1.11 The Committee does not consider the policy merits of delegated legislation.
- 1.12 The Committee has the power to recommend that Parliament ‘disallow’ an instrument of delegated legislation. In most cases where the Committee has recommended disallowance the Parliament has supported the Committee’s recommendation.

2 REVIEW OF LOCAL LAWS

- 2.1 A major role of the Committee is the review of local laws which, like other instruments of delegated legislation, are published in regular editions of the Government Gazette.
- 2.2 In 2018, the Committee scrutinised over 120 local laws.

Process of Reviewing Local laws

- 2.3 Once a local law has been published in the Gazette, the relevant local government must provide various documents to the Committee within 10 working days. A list of the documents that must be provided is available on the Committee website. The documents include, but may not be limited to, a copy of the local law, explanatory memorandum, supporting materials and the statutory checklist.
- 2.4 When reviewing local laws, the Committee may have some general queries, or require further information. In this case it usually writes to or contacts the relevant local government’s President or Mayor and requests further information to assist in its review of the local law. In many cases, the responses received address the Committee’s questions and no further action is required.
- 2.5 Sometimes a local law offends the Committee’s Terms of Reference but the defect can be addressed without re-making the instrument. In this situation the Committee usually seeks an undertaking from that Local government to amend the instrument. (For instruments with defects that are unable to be corrected via amendment see Disallowance heading below).
- 2.6 Local governments usually undertake to amend or repeal the delegated legislation within six months of the date of the undertaking.
- 2.7 The undertakings are made by resolution at Council meetings. The undertakings are then provided to the Committee by the Council.
- 2.8 The Committee monitors whether delegated legislation has been amended within the agreed timeframe.
- 2.9 The Committee maintains a list of undertakings made by local governments which can be accessed on the Committee’s website.
- 2.10 Undertakings have the benefit of securing an acceptable outcome in relation to the Committee’s scrutiny concerns without requiring disallowance.

Notices of Motion to Disallow

- 2.11 While the Committee waits for a response to a query or its request for an undertaking, the Committee may give Notice of Motion to disallow the instrument in the Legislative Council.
- 2.12 This does not necessarily mean that the Committee will be recommending disallowance, but it has the effect of 'reserving its right' to recommend disallowance if required.
- 2.13 In the vast majority of cases, these 'protective' notices are withdrawn when the Committee receives a satisfactory response from the local government.

Disallowance

- 2.14 When required, the Committee reports to the Parliament recommending the disallowance of all or part of the local law.
- 2.15 The Committee only recommends the disallowance of an instrument as a last resort, where:
- agreement cannot be reached on acceptable arrangements
 - the identified defect in the instrument cannot be cured without re-making the instrument—for example, because statutory procedures for the making of the instrument were not followed.
- 2.16 If Parliament disallows a local law, the effect is generally the same as if the local law had been repealed. The local law will cease to have effect, but disallowance will not affect the validity of anything done under the local law while it was in force.

Late Responses

- 2.17 The Committee works under strict time limits governed by the *Interpretation Act 1984* (WA) and the Standing Orders of the Legislative Council. This is why the Committee imposes deadlines for materials to be supplied to the Committee, and for responses to our correspondence.
- 2.18 The Committee only has 14 sitting days from the local law being tabled in Parliament in which it can give Notice of Motion to disallow a local law.
- 2.19 In cases where the time limit set by the Committee for a response cannot be met, Local government officers should contact Committee staff to determine whether an extension of time can be granted.

3 Requirements of Local laws

Must be 'Within Power'

- 3.1 The Committee may consider that an instrument is 'not within power' for various reasons, including but not limited to the instrument:-
- is an unreasonable exercise of the delegated legislative power
 - is procedurally invalid

- abrogates a fundamental common law principle without express or necessarily implied authority from the empowering Act
 - is inconsistent with its empowering Act or other legislation.
- 3.2 The making and enforcement of local laws is directed by legislation. The empowering legislation enables the making of local laws, sets out the process of making local laws and puts parameters around the content of local laws.
- 3.3 Local laws should not overlap, duplicate, conflict with or be inconsistent with existing legislative provisions. Section 3.7 of the *Local Government Act* provides:
- A local law made under this Act is inoperative to the extent that it is inconsistent with this Act or any other written law.
- 3.4 Copies of legislation from the federal and state jurisdictions are readily available online.

Procedure of making the Local law must be strictly followed

- 3.5 Section 3.12 of the *Local government Act 1995* (WA) sets out the procedure which must be followed when making local laws.
- 3.6 The procedure is mandatory and must be followed in chronological order. Failure to follow the procedure may render the local law invalid (see: Section 3.12 of the *Local Government Act*) and will likely result in the Joint Standing Committee recommending the law is disallowed.
- 3.7 There is a checklist on the Committee’s website which can be used to ensure all steps have been completed. This checklist must be fully completed in chronological order and supplied to the Committee after the local law is published in the Gazette.

Consistent & Current Language

- 3.8 Ideally, the drafter of a local law should ensure consistency of language within the local law. The same word should be used throughout the local law, unless the change of word is intended to have a different meaning.
- 3.9 Where possible, the same wording that is used in the empowering Act should be used in the local law.
- 3.10 Check that the definitions in your local law are not inconsistent with those contained in an empowering Act.

Enforceable

Penalties

- 3.11 Give thought to the penalties imposed by local laws. The maximum penalty permitted to be prescribed in local laws is \$5,000. Section 3.10(1) of the *Local Government Act* provides:
- A local law made under this Act may provide that contravention of a provision of the local law is an offence, and may provide for the offence to be punishable on conviction by a penalty not exceeding a fine of \$5,000.

- 3.12 For continuing offences, section 3.10(2) of the *Local Government Act* provides:
- If the offence is of a continuing nature, the local law may make the person liable to a further penalty not exceeding a fine of \$500 in respect of each day or part of a day during which the offence has continued.
- 3.13 Section 3.10(4) of the *Local Government Act* provides the level of penalty may be related to:
- (a) the circumstances or extent of the offence
 - (b) whether the offender has committed previous offences and, if so, the number of previous offences that the offender has committed.
- 3.14 Ideally, a breach of a similar local law provision should have a similar impact from Council to Council. If there is a wide discrepancy between neighbouring or like Councils in the penalty for similar offences, Councils should explain in the explanatory memorandum why their penalties are different.

Permits/Licenses

- 3.15 References to permits should be consistent. A local law that variously refers to 'permit', 'consent', 'authority', 'written consent' and 'written authority' can be confusing.
- 3.16 Generally, it is preferable that activities requiring a permit are collected together within a single section of the local law rather than being scattered.
- 3.17 Ideally, the local law will set out clearly:
- a form (or forms, if they vary with differing types of permit) of application for permit showing the information required to be provided by applicants
 - the factors Council will take into account in assessing an application
 - the conditions on which a permit will be issued
 - the consequences of breach or failure to comply with conditions
 - the circumstances under which a permit may be refused
 - the circumstances under which a permit may be cancelled or modified
 - the process that will be adopted to implement these matters and the timeline which will be adopted
 - the rights of an applicant to a review of the decision in relation to conditions or refusal.

Accessible

- 3.18 All associated material referenced in the local law or applied by the local law (for example, Standards) needs to be accessible in the same way the local law is.

References to other Acts

- 3.19 When a Local law is made under legislation other than the *Local Government Act*, the Committee requires the full name of the Act and the section relied upon to be stated in the explanatory memorandum.

Clarity

3.20 If a local law imposes an obligation on a person to do something, those obligations should be clearly stated.

Must not Remove Rights

3.21 Local laws should not have any unintended effect on any person's existing rights or interests such as, but not limited to:

- reversal of onus of proof
- excluding procedural fairness
- acquisition of property without compensation
- access to the Courts or judicial review.

4 Past Issues

4.1 Each local law is scrutinised individually and issues raised by the Committee may or may not result in the request of undertaking, or a recommendation of disallowance. Examples of issues that the Committee has raised with local governments in the past include, but are not limited to the following:

- The year of the local law title not reflecting the year the local law is published in the Gazette.
- Incorrect cross-referencing to other clauses within the local law. Particular care should be taken to ensure that cross-references are still correct after amendments have resulted in clauses being re-numbered or shuffled.
- Repeat punishment of the same offence. For example, refusing a licence solely on the basis of a previous cancellation of license.
- Extrinsic materials being inaccessible. It is common for local laws to refer to Australian and New Zealand Standards. Standards are not freely accessible online. Councils should advise the Committee in the explanatory memorandum where ratepayers can view the Standards free of charge.
- Imposing penalties in 'pre-emption' of somebody breaching the local law. Councils should reflect on the wording of the local law to ensure that ratepayers are not penalised prior to an actual contravention of the local law occurring.
- Outdated references. The Committee recommends checking each reference to other legislation to make sure that legislation is still current. One example is local laws using the outdated term 'ACROD sticker' instead of 'disability parking permit.' Likewise, referencing the *Local Government (Parking for Disabled Persons) Regulations 1988* instead of the *Local Government (Parking for People with Disabilities) Regulations 2014*.
- Failure to send a copy of the local law to the correct State Government Minister. It is essential that the Local government is sent to the correct State Minister prior to the local law being published in the Gazette. The *Local*

government Act provides that a local law may be invalid if the correct procedure is not substantially followed in making the local law, regardless of whether the local law is otherwise well drafted.

- Failure to notify a permit or licence holder of a change of conditions to a permit or license.
- Varied conditions of a permit or license taking effect prior to the licence or permit holder receiving notification of the varied conditions.