Report 19

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Annual Report 2020

Presented by
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and
Hon Robin Chapple MLC (Deputy Chair)
November 2020
Joint Standing Committee on Delegated Legislation

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EXECUTIVE SUMMARY

Introduction

1 This report discusses some of the key activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January and 19 November 2020 (Reporting Period).1

2 The Committee's role is to scrutinise, on behalf of the Parliament, instruments made under statutory delegation by:
   - the Governor in Executive Council
   - Ministers
   - statutory bodies
   - local governments.

3 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.2

Committee activities

4 The Committee continues to scrutinise a large volume of delegated legislation.

5 In the Reporting Period, the Committee considered 330 instruments, including 181 regulations and 80 local laws.

6 Motions for the disallowance of delegated legislation usually do not proceed in the Parliament if satisfactory undertakings to amend the instrument are provided to the Committee. The Committee only recommends the disallowance of an instrument as a last resort. During 2020, the Committee received three departmental (Ministerial) and 17 local government undertakings.

7 The Committee recommended that Parliament disallow one instrument, being the Curtin University Statute No 5 – Election of Council Member (Statute No. 5).

8 The indicative date for resolution of the motion for disallowance of Statute No. 5 is 26 November 2020.

9 The Committee also tabled an Information Report, informing Parliament of the Committee’s concerns relating to Curtin University’s interpretation of the Curtin University Act 1966, using Curtin University Statute No. 12 – Admission and Enrolment as a case study.

Issues relating to regulations

10 One regulation imposed a retrospective obligation, which the Committee considered was inappropriate for subordinate legislation under its term of reference 10.6(d). The Minister for Education and Training provided the Committee with an undertaking to amend the regulations to address the Committee’s concerns, following which no further action was required.

11 Another regulation caused a reversal of the onus of proof. The Committee considers that delegated legislation should not reverse the onus of proof unless that reversal is authorised

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1 The Committee notes it was necessary to table the Annual Report prior to the conclusion of the calendar year due to the pending prorogation of the 40th Parliament.

2 The Committee’s terms of reference are listed on the back inside cover of this report.
by an empowering Act, either explicitly or by necessary implication. The Minister for Transport provided the Committee with an undertaking to amend the regulations to address the Committee’s concerns, following which no further action was required.

12 The Committee requested additional costing methodology information for three regulations imposing fees.

**Issues relating to local laws**

13 The Committee requested and obtained 17 undertakings from local governments to amend their local laws to address specific issues identified by the Committee.

14 Two of the undertakings requested (and subsequently provided) sought the repeal of the relevant local laws in entirety due to the significant number and extent of issues contained within them.
CHAPTER 1

Introduction

Overview

1.1 This report:
   - outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January and 19 November 2020 (Reporting Period).
   - discusses some of the more notable instruments considered by the Committee
   - comments on significant issues arising from the Committee’s scrutiny of delegated legislation.

1.2 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider instruments of delegated legislation that have been published. Like its predecessors, the Committee in this 40th Parliament considers only:
   - instruments that are subject to parliamentary disallowance
   - instruments noted by an individual Member.

1.3 The majority of the instruments considered are regulations made by the Executive Government via the Governor in Executive Council. Other instruments include local laws made by local governments, court rules, by-laws, planning schemes, orders, notices, plans and other variously-named instruments made by a range of persons or bodies.

Terms of reference

1.4 The Committee’s terms of reference (TOR) are listed on the back inside cover of this report. They were adopted by the Parliament on 15 June 2017, when the Committee was established. The Committee operates under the Standing Orders of the Legislative Council.

1.5 The Committee considers whether an instrument complies with or offends any of the requirements set out in item 10.6 of its TOR, including whether the instrument is ‘within power’ or ‘contains only matter that is appropriate for subsidiary legislation’.

Committee Members

1.6 The Committee had two changes of membership during 2020.

1.7 In 2020, the Committee was constituted by the following:
   - Ms Emily Hamilton MLA (Chair)
   - Hon Robin Chapple MLC (Deputy Chair)
   - Hon Martin Pritchard MLC
   - Mrs Robyn Clarke MLA

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3 The Committee of the 40th Parliament was established by both Houses on 15 June 2017: Western Australia, Legislative Council, Parliamentary Debates (Hansard), 15 June 2017, p 951 and Legislative Assembly, Parliamentary Debates (Hansard), 15 June 2017, p 1048.

4 Either under section 41(1)(a) of the Interpretation Act 1984 or another written law. Committee term of reference 10.5: Standing Orders of the Legislative Council, schedule 1, cl 10.5.

5 Pursuant to section 42 of the Interpretation Act 1984 or another written law.

6 Standing Orders of the Legislative Council, standing order 156.
• Dr David Honey MLA
• Mr Kyran O’Donnell MLA
• Hon Charles Smith, MLC (membership ended 12 February 2020)
• Hon Robin Scott MLC (membership commenced 12 March 2020)
• Hon Kyle McGinn MLC (membership ended 18 June 2020)
• Hon Matthew Swinbourn MLC (membership commenced 25 June 2020).

1.8 The current Committee membership is noted on the front inside cover of this report.

Committee process

1.9 When the Committee has questions about an instrument, it usually writes to or contacts the relevant Minister, or local government President or Mayor, requesting further information to assist in its examination of the instrument. In many instances, the responses received address the Committee’s questions and no further action is required.

1.10 When the Committee identifies an issue of concern and forms the view that a clause or clauses in the instrument offend the Committee’s TOR, it usually seeks an undertaking from the responsible Minister or local government to amend the instrument.

1.11 The Committee normally requires the responsible Minister or local government to undertake to amend or repeal the delegated legislation within three or six months of the date of the undertaking. The Committee monitors whether delegated legislation has been amended within the agreed timeframe.

1.12 While the Committee awaits the response to investigations or its request for undertakings on a particular instrument, it is often necessary to authorise a Committee Member to give notice of a motion to disallow the instrument in the Legislative Council. Notice must be given within 14 sitting days after the instrument is tabled in the Parliament. The majority of these notices of motion are later discharged from the Legislative Council Notice Paper following receipt of satisfactory responses from Ministers or local governments.

1.13 When requested undertakings are provided, the usual course is for the Committee to accept the undertakings and recommend the discharge of the motion to disallow. However, when required, the Committee reports to the Parliament recommending the disallowance of all or part of the instrument.

1.14 The Committee only recommends the disallowance of an instrument as a last resort, that is:
• where agreement cannot be reached on acceptable arrangements
• where 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.

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7 The Legislative Council has procedures in place for dealing with motions for disallowance, including those motions which are instigated by the Committee: refer to Standing Orders of the Legislative Council, standing order 67.
8 Interpretation Act 1984 s 42. Note that other Acts may provide for a different period during which Notices of Motion to disallow their delegated legislation may be given.
9 Which usually become motions to disallow on the third sitting day after they have been given: Standing Orders of the Legislative Council, standing order 67(3).
10 The statistics relating to this practice are contained in Table 1 on page 4.
**Undertakings lists**

1.15 The Committee posts two lists of undertakings on its webpage,\(^{11}\) namely:
   - departmental undertakings (undertakings provided by Ministers, government departments, agencies and statutory authorities)
   - local government undertakings.

1.16 These lists inform stakeholders of issues the Committee has raised and assist departmental and local government officers in drafting delegated legislation. In particular, the local government undertakings list allows local governments and their advisers to identify systemic problems in local laws.

**Acknowledgments**

1.17 The Committee relies on the assistance provided by relevant Ministers, departments, statutory bodies and local governments in undertaking its function of scrutinising a large volume of delegated legislation within time constraints. The Committee extends its appreciation to those Ministers and contact persons who provided that assistance throughout the year.

1.18 In particular, the Committee thanks the:
   - Department of Local Government, Sport and Cultural Industries (DLGSC), which acts as a valuable filter in dealing with problematic proposed local laws. The advice provided by the DLGSC resolves many issues in the local laws before they are formally made, published and referred to the Committee
   - Western Australian Local Government Association (WALGA), another valued source of local laws information and expertise for local governments.

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CHAPTER 2
Committee activities in 2020

Volume and nature of work

2.1 The Committee held 17 meetings in the Reporting Period.

2.2 Table 1 provides a breakdown of the Committee’s activities in respect of instruments published in the Government Gazette during that period.

Table 1. The Committee’s work statistics for 2020

<table>
<thead>
<tr>
<th>Disallowable instruments published in the Government Gazette</th>
<th>330</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Regulations</td>
<td>181</td>
</tr>
<tr>
<td>• By-laws (made by the Executive)</td>
<td>2</td>
</tr>
<tr>
<td>• Local laws (made by local government)</td>
<td>80</td>
</tr>
<tr>
<td>• Rules</td>
<td>16</td>
</tr>
<tr>
<td>• Other instruments referred (including planning schemes, orders, notices and plans)</td>
<td>51</td>
</tr>
</tbody>
</table>

Notices of motion for disallowance given | 22 |
Motions to disallow discharged | 19 |
Hearings held by the Committee | 0 |
Instruments for which undertakings were provided to the Committee to amend the instrument | 18 |
Instruments for which undertakings were provided to the Committee to repeal the instrument | 2 |
Reports tabled | 3 |
Disallowance reports tabled | 1 |

2.3 Figure 1 sets out information about the 20 instruments where undertakings were given to the Committee. It provides an indication of the nature, number and frequency of issues encountered by the Committee. Some instruments contained multiple issues.
Figure 1. The nature, number and frequency of issues encountered by the Committee in 2020 where undertakings were provided

<table>
<thead>
<tr>
<th>Issues breakdown</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drafting errors</td>
<td>70%</td>
</tr>
<tr>
<td>Sub-delegation</td>
<td>12%</td>
</tr>
<tr>
<td>Unintended effect</td>
<td>6%</td>
</tr>
<tr>
<td>Uncertainty</td>
<td>6%</td>
</tr>
<tr>
<td>Beyond power</td>
<td>6%</td>
</tr>
</tbody>
</table>

**Drafting issues**

2.4 Seventy percent of the issues encountered in 2020 related to drafting.

2.5 Fifty two percent of the issues encountered in 2019 related to drafting. In 2018, drafting issues comprised 56 percent of issues. See figure 2.

2.6 The overwhelming majority of drafting issues detected by the Committee were in local laws. Drafting issues in local laws is discussed further in Chapter Four.

2.7 The Committee notes many of the drafting errors could have been avoided by conducting vigorous proofreading and cross-reference checks prior to the instrument being published.

2.8 Drafting issues also arise when local governments rely upon a local law of another district, without ensuring that:

- no issues have been identified by the Committee in that local law
- a sufficient time period has lapsed to ensure that the precedent local law has been scrutinised by the Committee, noting that there is often a delay between local laws being published in the Government Gazette and the Committee finalising its scrutiny of an instrument.

2.9 The Committee hopes to see a reduction of drafting errors in 2021.
Committee reports

2.10 In 2020, the Committee presented the following reports to the Legislative Assembly and the Legislative Council:

- Report 18: *Curtin University Statute No. 5 – Election of Council Members and Curtin University Statute No. 12 – Admission and Enrolment* tabled on 19 November 2020 in the Legislative Assembly, and 24 November in the Legislative Council

2.11 These reports can be viewed at [www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del) by choosing ‘reports’.

Undertakings

2.12 During the reporting period, the Committee received three departmental and 17 local government undertakings. The lists of undertakings can be viewed at [www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del) by scrolling down to ‘Undertakings provided to the Committee’.

Circulars relating to explanatory memoranda

2.13 Three years ago the Committee provided suggestions for the review of the following two government circulars in its *Annual Report 2017*:

- Premier's Circular Number 2014/01, *Subsidiary legislation—explanatory memoranda*, directed at State government departments and agencies

2.14 These two circulars direct delegated legislation makers to provide the Committee with the explanatory material that it requires to perform its role. At the date of this report, the two circulars have not been updated.
CHAPTER 3
Issues in regulations

COVID-19

3.1 Consideration of the work and achievements of the Committee should recognise the Committee’s scrutiny of instruments necessitated by, or as a consequence of, the COVID-19 pandemic.

3.2 The Committee continued to meet throughout the COVID-19 period. When social distancing requirements or capacity limits prevented the Committee from meeting in-person; electronic meetings were utilised.

3.3 The Committee scrutinised 35 COVID-19 related instruments during the Reporting Period.\(^\text{12}\)

3.4 Common themes surrounding the nature and purpose of the COVID-19 related instruments were:

- changes to fees and charges, including the temporary waiver of certain fees
- amending procedures to enable and encourage the use of electronic means in local governments, courts and tribunals
- mandatory testing and quarantine
- taxation amendments
- amendment to residential tenancy and commercial tenancy laws
- notifiable disease orders.

Imposing retrospective obligations

3.5 The Committee identified an issue with a subsection of the *Vocational Education and Training (Colleges) Amendment Regulations 2020 (No. 2)*, which imposed a retrospective obligation on students to pay additional course fees for a Vocational Training course or unit(s), after they have already paid for the course or unit(s).

3.6 The Committee considers that retrospective obligations of the above nature are unsuitable for subsidiary legislation. The Committee wrote to the Minister for Education and Training, advising her of their concerns.

3.7 The Minister for Education and Training provided an undertaking to amend the Amendment Regulations to:

- remove the relevant subsection
- make any other necessary changes to ensure that students are not required to pay additional course fees if the course they are undertaking is reclassified after they have paid course fees.\(^\text{13}\)

Fees and Charges

3.8 State government agencies may charge fees if a legislative enabling power exists to do so. The Committee reviews fees prescribed within subsidiary legislation.

\(^{12}\) See Appendix 2.

\(^{13}\) Hon Sue Ellery MLC, Minister for Education and Training, Letter, 29 September 2020.
3.9 The fees must be reasonably set to recover costs of the service provided and should not cross-subsidise. Cross-subsidies occur when one group of users pay for more than the costs of the services (or products) they receive, and the ‘surplus’ is used to offset the cost of services provided to other users.\textsuperscript{14}

3.10 To assist the Committee to exercise its scrutiny functions, the Committee requires Ministers to provide, through their relevant departments, certain fee information, as set out in the Premier’s Circular.\textsuperscript{15} The information is to be provided to the Committee once an instrument has been published in the Government Gazette. This information includes, but is not limited to, a fee table indicating:

- the fee increases or decreases being imposed
- any cross-subsidisation of costs
- the percentage of cost recovery being achieved.

3.11 Notwithstanding the above, the Committee also expects agencies to be able to provide full details of their costing methodology on request.

3.12 The Committee requested additional costing methodology details from the following Ministers in order to be satisfied that the fees imposed were acceptable:

- Minister for Transport; Planning, in relation to driver and vehicle services fees
- Minister for Mines and Petroleum; Energy; Industrial Relations, in relation to water fees
- Minister for Mines and Petroleum; Energy; Industrial Relations, in relation to mining and petroleum fees and charges.

3.13 The Committee recognises and supports the work of the Office of the Western Australian Auditor General, particularly the Office’s reporting on fee-setting by Departments.\textsuperscript{16}

**University Statutes**


3.15 Report 18 served two purposes:

- firstly, to support the Committee’s Notice of Motion to Disallow *Curtin University Statute No. 5 – Election of Council Members* (Statute No. 5)
- secondly, to provide an information report to the House, using *Curtin University Statute No. 12 – Admission and Enrolment* as a case study, to outline issues in the *Curtin University Act 1966*, which, the Committee considered, required the attention of Parliament.

3.16 The Committee recommended Parliament disallow Statute No. 5 on the basis that:

- The *Curtin University Act 1966* expressly requires Statutes (which are disallowable instruments) to prescribe the manner of electing members of Council. However, Statute

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\textsuperscript{14} Victoria, Department of Treasury and Finance, *Cost Recovery Guidelines*, January 2013, p 28.


\textsuperscript{16} See for example, Western Australian Auditor General, Report 13 of 2019-20, *Fee-setting by the Department of Primary Industries and Regional Development and Western Australia Police Force*, 4 December 2019.
No. 5 failed to prescribe any such detail, and instead provided that all such matters would be set out in rules (which are not disallowable instruments).

- The Committee was of the view that by electing to prescribe matters in rules rather than Statute, the University was in effect avoiding the scrutiny of Parliament.

3.17 Report 18 further noted the competing interpretations of section 34(3) of the *Curtin University Act 1966* (the provision authorising the making of rules). The Committee noted its concern about Curtin University’s interpretation of the Act, which in its view, results in an outcome where Curtin University decides which matters are disallowable by Parliament or not.17

3.18 Report 18, which sets out the Committee’s full reasons for recommending the *Curtin University Statute No. 5 – Election of Council Members* be disallowed and the Committee’s concerns about the *Curtin University Act 1966*, can be viewed on the Committee’s webpage at [www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del) by choosing ‘reports’.18

**Public Transport Authority Amendment Regulations 2020**

3.19 The Committee identified issues with provisions of the *Public Transport Authority Amendment Regulations 2020*, which caused a reversal of the onus of proof.

3.20 The Committee considers that delegated legislation should not reverse the onus of proof unless that reversal is authorised by an empowering Act, either explicitly or by necessary implication.

3.21 The same regulation also contained a power for public transport workers to seize open containers of liquor and lost or stolen electronic tickets (for example, SmartRider cards or mobile electronic devices containing ticket software). The Minister for Transport provided the Committee with an undertaking to amend the regulations to address the Committee’s concerns, following which no further action was required.19

17 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 18: *Curtin University Statute No. 5 – Election of Council Members and Curtin University Statute No. 12 – Admission and Enrolment*, tabled 24 November 2020.

18 ibid.

CHAPTER 4
Issues in local laws

Most local laws do not require amendment

4.1 The Committee reviewed 80 local laws in 2020.

4.2 The Committee wrote to local governments on 22 occasions requesting further information, seeking undertakings or issuing reminders about Committee requirements.

4.3 Out of the 80 local laws, the Committee requested amendments to 17 of these.

Comparison between 2018, 2019 and 2020

4.4 The Committee reviewed 99 local laws in 2019. Out of the 99 local laws, the Committee requested amendments to 29 of these. The Committee received undertakings for 28 of those local laws, and recommended disallowance for 1 local law.

4.5 In 2018, the Committee reviewed 121 local laws and requested undertakings in relation to 30 of those local laws.

4.6 The Committee is pleased to note that 78 percent of local laws reviewed by the Committee in 2020 did not require amendment.

4.7 The Committee has noted that local governments are continuing to:

- use the WALGA model law templates or another recently published local law as a template
- seek and accept advice from the DLGSC prior to the local law being published in the Government Gazette
- review prior Committee decisions by utilising the Committee’s undertakings list.

4.8 The Committee’s scrutiny of local laws has been assisted by the above measures. The percentage of local laws requiring amendment from 2018 to 2019 is similar to this Reporting Period. The Committee is pleased that the Committee’s undertakings list is utilised by local governments to identify previous issues raised by the Committee. The Committee hopes to see a decrease in the amount of local laws that require amendment in 2021.

WALGA Model Law Templates

Accessibility to Template Local Laws

4.9 WALGA is the peak local government industry body and, as at 30 June 2020, had approximately 120 ‘member’ WA Local Governments.20

4.10 WALGA provides model local laws, which local governments can use as pro-forma templates for their own local laws.

4.11 The Committee notes that the model local laws are only available to councils that are fee-paying subscribed members of WALGA. The model local laws are part of the subscription services offered by WALGA, and online access to the templates is accessible only to users from subscribing councils who have approved access.21

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4.12 The WALGA website confirms:

Subscribers will have online access to information and guidance on the process for making, amending and repealing Local Laws and the complete suite of template Local Laws in a ready-to-adopt and legislatively compliant format.\(^{22}\)

4.13 The accessibility of the Model Local Laws to all councils is an issue that the next Committee may wish to explore.

**Waste Local Law Template**

4.14 The Committee recently identified an error in the model ‘Waste’ local law, which results in the model containing a duplicate clause: effectively creating two offences for the same conduct. The Committee bought this issue to WALGA’s attention and anticipates that the relevant steps will be taken for the template to be corrected in due course.

**Undertakings in relation to local laws**

4.15 The Committee notes that drafting issues were the majority of issues detected in local laws in 2020.

4.16 The drafting issues ranged from minor grammatical issues to substantial issues, such as those that created unintended effects or rendered the local law difficult to interpret. Examples of these drafting issues include but is not limited to:

- cross-referencing to the wrong clauses or schedules
- using a defined word in a clause, which changed the intention of the clause to something that was not intended by the local government
- clauses with missing text
- clauses with typographical or formatting errors
- clauses that created vague, ambiguous obligations
- lack of review clauses or incomplete/inaccurate review clauses
- clauses that created sub-delegation of the exercise of law-making powers
- clauses that were beyond power of the local law’s empowering Act(s)
- the clause creates an obligation to do something, which was not intended
- the local law does not contain a definition of something that is integral to the local law.

4.17 Where a drafting issue changes the meaning of a local law, the Committee usually requests an undertaking that the local law will be amended within six months, and that the offending clauses of the local law will not be enforced pending amendment.

**Minor drafting issues**

4.18 Where a local law contains a minor drafting issue, the Committee usually requests an undertaking from the local government that the local law be amended when it is next reviewed. Minor drafting errors usually include minor typographical or formatting errors.

**Significant drafting errors**

4.19 The Committee requested that the City of Vincent repeal its *City of Vincent Parking Amendment Local Law 2020* in its entirety.

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The Committee also requested that the Shire of Manjimup repeal its *Shire of Manjimup Cat Local Law 2020* in its entirety.

This was a departure from the Committee’s usual practice of requesting amendments to local laws to address any issues identified by the Committee.

The Committee determined that the drafting errors in the above Local Laws were too extensive to address via amendment, and sought undertakings for the repeal of the Local Laws in entirety.

The City of Vincent and the Shire of Manjimup both provided undertakings to repeal their respective Local Laws and the matter was resolved without requiring disallowance.\(^{23}\)

### Beyond power definitions of ‘nuisance’

The Committee notes that some local laws attempt to define the term ‘nuisance’. Such definitions often expand, or are inconsistent with, the legal meaning of nuisance. This year (as well as in 2017 and 2019), the Committee noted issues with the definitions of nuisance in local laws.

The Shire of Manjimup in the *Shire of Manjimup Cat Local Law 2020*, which was published in the Government Gazette on 17 September 2020 included the following definition of nuisance:

\[(a)\] excretes or urinates on property where the cat does not normally reside or is registered at;
\[(b)\] an activity or condition which is harmful or annoying and which gives rise to legal liability in the tort of public or private nuisance at law;
\[(c)\] an unreasonable interference with the use and enjoyment of a person of his or her ownership or occupation of land;
\[(d)\] interference which causes material damage to land or other property on the land affected by the interference; or
\[(e)\] is, or is likely to be, injurious or dangerous to the health of any person or domestic or native fauna.

In the Committee’s view, when a local law’s empowering Act does not define the term ‘nuisance’, a local law should not attempt to define the same. Often such attempts result in a definition that is beyond power of the Act. The *Cat Act 2011* does not define ‘nuisance’ and therefore the common law meaning of the word should apply.

The Committee advised the Shire of Manjimup\(^{24}\) that, in its view, paragraphs (a) and (e) of the definition of nuisance are not within power of the *Cat Act 2011* or the *Local Government Act 1995*, as they:
- purport to apply to situations outside the ordinary and legal meanings of ‘nuisance’
- are unreasonable.\(^{25}\)

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\(^{23}\) Emma Cole, Mayor, City of Vincent, letter, 22 September 2020; Paul Omodei, President, Shire of Manjimup, letter, 6 November 2020.

\(^{24}\) Paul Omodei, President, Shire of Manjimup, letter from the Joint Standing Committee on Delegated Legislation, 21 October 2020.

\(^{25}\) Unreasonable has been defined by the Courts in several cases but cited frequently in *City of Brunswick v Stewart* (1941) 65 CLR 88 at 97 per Starke J: *The question is whether the delegated legislation is so oppressive or capricious that no reasonable mind can justify it.*
4.28 As noted in the 2019 Annual Report, the Committee previously allowed a definition of
nuisance (comprising paragraphs (b) to (d) of the definition outlined in paragraph 4.25), in
some cat local laws and other local laws. Those paragraphs are contained in the WALGA
template Urban Environment and Nuisance Local Law.

4.29 The Committee continues to monitor the use of definitions of ‘nuisance’ in local laws. The
Committee would like to see a cessation in the use of ‘nuisance’ definitions that do not
conform with the definitions contained in WALGA template local laws.

**Determination devices in local laws**

4.30 On 12 March 2020, the Shire of Coolgardie enacted the Shire of Coolgardie Parking Local Law
2019 (Coolgardie Local Law) to replace an outdated parking local law. The Coolgardie Local
Law contained several problematic determination devices in clauses 1.10, 2.1, 2.5, 3.1 and 3.4.

4.31 A determination device is a means by which the Council of a local government purports, in a
local law, to sub-delegate the exercise of its powers under the Local Government Act 1995 to:

- a mere resolution of a simple majority of the council members
  *or*
- to the administrative arm of the local government.

4.32 It is a fundamental principle of administrative law that, where a Parliament delegates a power
or function to a person or body, that person or body must exercise the power or function
personally, and not delegate it to another.

4.33 The Committee’s historical position on determination devices is that they avoid
Parliamentary scrutiny as, unlike a local law:

- the procedural steps set out in section 3.12 of the Local Government Act 1995 are not
  required to be followed to make, repeal or amend a determination
- determinations are not required to comply with the requirements of section 42 of the
  Interpretation Act 1984 in relation to publication in the Government Gazette, tabling in
  both Houses of Parliament and being subject to disallowance.

4.34 Determination devices in parking local laws allow the local government to make decisions
about certain issues, such as the fees for parking in a certain place; the classes of vehicles
allowed to park there and the use of parking bays.

4.35 Since 2004, the Committee has, in limited circumstances, accepted the use of determination
devices in parking local laws if:

- the local law establishes areas that may be designated as ‘parking stations’ or ‘no
  parking areas
  and
- the details of specific parking bays, days and times are determined by the local
government and adequately signposted at those parking bays.

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26 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 17, Annual

27 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, report 89, Annual

28 ibid.

29 ibid.

30 Section 3.12 of the Local Government Act is set out in Appendix 1.
The exercise of the determination power needs to be performed by a Council and not delegated to a staff member. Use of the words ‘by resolution’ in determination devices, when referring to the ‘local government,’ provides that the decision must be made by the Council. It also ensures that there is a record of decision made in Council minutes.

The use of public notice in relation to determination devices is also important, as it allows public knowledge and scrutiny of decisions that have been made by a Council.

The Committee requested undertakings from the Council to amend the Local Law to ensure that:

- all determinations were made by way of Council Resolutions
- adequate public notice was used, where applicable.

The Shire provided undertakings to the Committee to amend the Local Law within six months.

Local Government Act Review

In November 2019 the Minister for Local Government announced the formation of a panel of experts to provide consideration and review of the Local Government Act 1995. The role of the Panel was to guide the review’s strategic direction and to consider and recommend high level guiding principles of the new Act.

In May 2020 the Local Government Review Panel published its Final Report: Recommendations for a new Local Government Act in Western Australia. The Final Report made the following observation:

Local Government Acts are among the most lengthy and complex pieces of legislation in any jurisdiction.

The panel proposed that a new Local Government Act:

Minimise the use of Regulations (which tends to enable more extensive and detailed oversight and intervention, and which requires time-consuming parliamentary drafting) by providing standardised guidelines and model codes, charters and local laws. Local governments could modify these ‘minimum’ provisions but would have to justify significant departures from them to the Joint Standing Committee on Delegated Legislation.

The DLGSC have indicated to the Committee that the Government are still in the process of reviewing and considering the recommendations made in the Final Report.

The Committee looks forward to liaising with the DLGSC in the future in relation to any recommendations or amendments that may affect the work of the Committee.

Ms Emily Hamilton MLA
Chair

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31 E Hamilton, Chair, Joint Standing Committee on Delegated Legislation, Letter from Shire of Coolgardie, 6 July 2020, p 1.
32 M Cullen, President, Shire of Coolgardie, letter, 6 July 2020.
34 ibid., p 8.
APPENDIX 1

LOCAL GOVERNMENT ACT 1995 SECTION 3.12

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.

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

(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 local 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; and

(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; and

(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) deleted]

(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 Government 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; and

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

(c) advising that the local law is published on the local government’s official website and that copies of the local law may be inspected at 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.

[Section 3.12 amended: No. 1 of 1998 s. 8; No. 64 of 1998 s. 6; No. 49 of 2004 s. 16(4) and 23; No. 26 of 2016 s. 5; No. 16 of 2019 s. 8.]
## APPENDIX 2

### COVID-19 RELATED INSTRUMENTS CONSIDERED BY THE COMMITTEE IN 2020

<table>
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<td>2</td>
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<td>Western Australian Local Government Association</td>
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Joint Standing Committee on Delegated Legislation

Date first appointed:
15 June 2017

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

'10. Joint Standing Committee on Delegated Legislation

10.1 A Joint Standing Committee on Delegated Legislation is established.

10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.

10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.

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

(b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.

10.5 Upon its publication, whether under section 41(1)(a) of the Interpretation Act 1984 or another written law, an instrument stands referred to the Committee for consideration.

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

(a) is within power;

(b) has no unintended effect on any person's existing rights or interests;

(c) provides an effective mechanism for the review of administrative decisions; and

(d) contains only matter that is appropriate for subsidiary legislation.

10.7 It is also a function of the Committee to inquire into and report on -

(a) any proposed or existing template, pro forma or model local law;

(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and

(c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.

10.8 In this order-

"instrument" means -

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

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

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