THIRTY-EIGHTH PARLIAMENT

REPORT 61

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2012

Presented by Mr Paul Miles MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

November 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

Mr Paul Miles MLA (Chairman)
Hon Sally Talbot MLC (Deputy Chair)
Hon Alyssa Hayden MLC
Ms Janine Freeman MLA
Mr Andrew Waddell MLA
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Government Response

This Report is subject to Standing Order 191(1):

> *Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.*

The two-month period commences on the date of tabling.

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IN RELATION TO THE

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EXECUTIVE SUMMARY

1 This *Annual Report 2012* outlines the activities of the Joint Standing Committee on Delegated Legislation in 2012 and comments on significant issues arising from the Committee's scrutiny of delegated legislation in 2012.

2 The Committee continues to scrutinise a large number of instruments of delegated legislation. Between 1 January 2012 and 9 November 2012, the Committee was referred 413 instruments including 238 regulations and 96 local laws.

3 The Committee takes this opportunity to thank the Ministers, departments and local governments who provide assistance to the Committee.

4 The Committee appreciates the work performed by local governments who, often with limited resources, undertake the difficult challenge of drafting local laws, and the contribution of the Department of Local Government and Western Australian Local Government Association in drafting local laws.

RECOMMENDATION

5 The following Recommendation, which relates to standards adopted in delegated legislation, appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Government requires departments, agencies and local governments to advise on their internet site where standards called up in subsidiary legislation can be accessed at no cost.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

ANNUAL REPORT 2012

1 INTRODUCTION

1.1 This *Annual Report 2012* outlines the activities of the Joint Standing Committee on Delegated Legislation (**Committee**) in 2012[1] and comments on significant issues arising from the Committee's scrutiny of delegated legislation in 2012.

1.2 Each year hundreds of instruments of delegated legislation are made which affect the lives of Western Australians. Delegated legislation has the same force in law as primary legislation and creates legal rights, obligations, duties and penalties.

1.3 The Parliament has delegated the parliamentary function of scrutiny of delegated legislation to the Committee. The Committee's terms of reference are noted on the inside cover of this report.[2]

1.4 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider delegated legislation published[3] under section 41(1)(a) of the *Interpretation Act 1984* or another written law.

1.5 The Committee resolved shortly after its establishment to consider only instruments of delegated legislation subject to disallowance pursuant to section 42 of the *Interpretation Act 1984* or another written law, and any other instrument noted by an individual member. On publication, these instruments are referred to the Committee.

1.6 The majority of the instruments of delegated legislation considered are regulations made by the Executive Government via the Governor in Executive Council. A significant proportion of delegated legislation considered are local laws made by local governments. The Committee also considers delegated legislation made by statutory bodies and boards.

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1 This *Annual Report 2012* is being tabled on 15 November 2012 as this is the last day that both Houses of Parliament will sit prior to the general election in March 2013.

2 As a result of the review of the Legislative Council Standing Orders, it is proposed to amend the Committee's terms of reference. This requires both Houses of Parliament to agree to the Committee's new terms of reference. While the Legislative Council has agreed to the proposed terms of reference, the Legislative Assembly has not considered the proposed terms of reference. Therefore, the Committee's terms of reference have not been amended.

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

Committee Members

1.7 The Committee is an eight-member committee comprised of equal membership from the Legislative Assembly and Legislative Council.

1.8 In 2012 the Committee was served by members noted on the inside cover of this report and Mr Joe Francis MLA. Mr Joe Francis MLA was Chairman until 14 August 2012, when he resigned as the Chairman and as a Member of the Committee.

1.9 On 20 August 2012 the Committee elected Mr Paul Miles MLA as Chairman. On 16 August 2012 Mr Vincent Catania MLA commenced as a member of the Committee.

1.10 The Committee is staffed by legal Advisory Officers and a Committee Clerk from the Legislative Council Committee Office.

2 COMMITTEE ACTIVITIES

Statistics

2.1 The Committee held 20 meetings in 2012[4]. A breakdown of the Committee's activities in 2012, noting instruments referred up until 9 November 2012, follows:[5]

Disallowable instruments referred	413
Regulations referred	238
By-laws (all by-laws were made by the Executive)	13
Local laws made by local government	96
Rules referred	9
Other instruments referred (including Metropolitan Regional Schemes, orders, notices and plans)	57
Notices of motion for disallowance given	43
Notices of motion for disallowance withdrawn	30
Hearings held by the Committee	2
Instruments where undertakings provided to the Committee to amend the instrument	20
Reports tabled in 2012	17[6]
Disallowance reports tabled in 2012	13[7]
Instruments disallowed on recommendation of the Committee	13[8]

4 This includes the meeting held on 12 November and meeting scheduled to be held on 26 November 2012.

5 The statistics in the first six rows relate only to instruments referred between 1 January 2012 and 9 November 2012. Further instruments will be referred during the 2012 calendar year.

6 This includes this *Annual Report 2012* and the report relating to the *City of Nedlands Parking and Parking Facilities Local Law 2012*, which the Committee has resolved to table in late November 2012.

7 This includes Report 55, *City of Perth Standing Orders Amendment Local Law 2012*, September 2012, (see footnotes 10 and 11) and the report to be tabled in relation to the *City of Nedlands Parking and Parking Facilities Local Law 2012* (see above footnote).

Committee process

2.2 Instruments of delegated legislation considered by the Committee span a diverse range of subject matters and may involve complex issues.

2.3 When the Committee has questions about an instrument of delegated legislation it usually writes to or contacts the relevant Minister or local government and requests further information to assist in its examination of the instrument. In many instances responses received address the Committee's questions and no further action is taken.

2.4 When the Committee identifies an issue of concern and forms the view that a clause/s in the instrument offends a Committee term of reference, it usually seeks an undertaking from the responsible Minister or local government to amend the instrument of delegated legislation.

2.5 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 table a 'protective' notice of motion to recommend disallowance of the instrument in the Legislative Council because section 42 of the *Interpretation Act 1984* provides that the notice of motion to recommend disallowance must be tabled within 14 sitting days of the instrument being tabled in Parliament.

2.6 When requested undertakings are provided, the usual course is for the Committee to accept the undertaking and remove the motion to disallow. In 2012, 20 undertakings were provided to the Committee — most relating to local laws.

2.7 The Committee reports to the Parliament recommending the disallowance of the delegated legislation or clause/s in the delegated legislation when required.

2.8 Most issues raised by the Committee in relation to delegated legislation arise because the Committee forms the view that the delegated legislation or clause/s in the delegated legislation are invalid and offend the Committee's term of reference (a), which provides that the Committee is to inquire into whether an instrument '*is authorized or contemplated by the empowering enactment*'.

Undertakings to amend delegated legislation

2.9 The Committee posts two tables of undertakings to amend delegated legislation provided to the Committee on its website, namely:

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[8] This assumes that the Legislative Council will disallow the *Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012* (Report 57), *City of Vincent Dogs Amendment Local Law No. 2 2012* (Report 58), *City of Subiaco Meeting Procedures Local Law 2012* (Report 60) and *City of Nedlands Parking and Parking Facilities Local Law 2012* (report to be tabled) as these reports relate to section 3.12 of the *Local Government Act 1995* non-compliance and the Legislative Council has a history of disallowing such instruments on the Committee's recommendation. The motions to disallow these instruments are scheduled to be debated on 27 and 29 November 2012.

- Departmental Undertakings (undertakings provided by government departments, agencies and statutory authorities); and

- Local Government Undertakings.

2.10 These tables inform stakeholders of issues the Committee has raised and assist officers in drafting delegated legislation. In particular, the Local Government Undertakings table is a point of reference for local governments and their advisers to ascertain systemic problems with a particular local law and clauses the Committee has taken issue with.

2.11 At the Committee's request, the responsible Minister, department or local government usually undertakes to amend or repeal the delegated legislation within six months of the date of the undertaking.

2.12 The Committee monitors if delegated legislation has been amended within time in accordance with the undertaking provided. Based on a cut-off date of June 2012, 61 of 73 undertakings provided in the 38th Parliament had been complied with. On some occasions delegated legislation is not amended within six months for reasons advised to the Committee.

2.13 The Committee will continue to monitor compliance with undertakings.

3 COMMITTEE REPORTS

3.1 In 2012 the Committee presented the following 16 reports to the Legislative Assembly and the Legislative Council:[9]

- Report 47 – *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, tabled on 3 May 2012.

- Report 48 – *Town of Kwinana Extractive Industries Local Law 2011*, tabled on 3 May 2012.

- Report 49 – *Annual Report 2011*, tabled on 3 May 2012.

- Report 50 – *Hospital Parking Fees: Queen Elizabeth II Medical Centre (Delegated Site) Amendment By-laws (No. 2) 2011, Royal Perth Hospital Amendment By-laws (No. 2) 2011, Women's and Children's Hospitals Amendment By-laws (No. 2) 2011, Fremantle Hospital Amendment By-laws (No. 2) 2011, Osborne Park Hospital Amendment By-laws (No. 2) 2011*, tabled on 16 August 2012 (**Hospital Parking Fees report**).

[9] Committee reports can be viewed at www.parliament.wa.gov.au/del, then choose Reports.

- Report 51 – *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*, tabled on 16 August 2012.

- Report 52 – *Liquor Control Amendment Regulations (No. 10) 2011*, tabled on 16 August 2012.

- Report 53 – *Mindarie Regional Council Standing Orders Amendment Local Law 2012*, tabled on 13 September 2012.

- Report 54 – *City of Bayswater Standing Orders Local Law 2012*, tabled on 13 September 2012.

- Report 55 – *City of Perth Standing Orders Amendment Local Law 2012*, tabled on 13 September 2012 (**Report 55**) (The Committee withdrew the notice of motion to disallow this local law for reasons noted in the Special Report tabled on 25 October 2012).

- Report 56 – *The Ability to Conduct Electronic Meetings and the Trial of iPads by Committee Members*, tabled on 13 September 2012 (**the iPad report**).

- Report 57 – *Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012*, tabled on 27 September 2012.

- Report 58 – *City of Vincent Dogs Amendment Local Law No. 2 2012*, tabled on 18 October 2012.

- *Special Report in relation to the City of Perth Standing Orders Amendment Local Law 2012*, tabled on 25 October 2012 (**Special Report**).[10]

- Report 59 – *City of Subiaco Meeting Procedures Local Law 2012*, tabled on 8 November 2012.

- Report 60 – *Metropolitan Region Scheme Major Amendment 1221/41: Banjup Urban Precinct*, tabled on 15 November 2012.

- Report 61 – *Annual Report 2012*, tabled on 15 November 2012.

3.2 The Committee has also resolved to table a disallowance report in relation to the *City of Nedlands Parking and Parking Facilities Local Law 2012*, which is likely to be tabled in late November 2012.

[10] For the reasons noted in the Special Report, the Committee withdrew its notice of motion to disallow the *City of Perth Standing Orders Amendment Local Law 2012*, the subject of a Committee recommendation in Report 55. The *City of Perth Standing Orders Amendment Local Law 2012* was not disallowed.

3.3 In 2012 the Committee will table 13 disallowance reports and ultimately recommended that 17 instruments (or clause/s in instruments) be disallowed.[11] As at 9 November 2012, the Legislative Council has disallowed nine instruments as recommended. The Legislative Council is scheduled to debate the motions to disallow five instruments the subject of Committee reports in late November 2012.[12]

Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011 **(Report 47),** ***Town of Kwinana Extractive Industries Local Law 2011*** **(Report 48),** ***Town of Bassendean Repeal Local Law 2010*** **and** ***Town of Bassendean Dust and Sand Local Law 2011*** **(Report 51),** ***Mindarie Regional Council Standing Orders Amendment Local Law 2012*** **(Report 53),** ***City of Bayswater Standing Orders Local Law 2012*** **(Report 54),** ***Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012*** **(Report 57),** ***City of Vincent Dogs Amendment Local Law No. 2 2012*** **(Report 58),** ***City of Subiaco Meeting Procedures Local Law 2012*** **(Report 59),** ***City of Nedlands Parking and Parking Facilities Local Law 2012*** **(report to be tabled)**

3.4 In 2012 the Committee recommended in the above nine reports that ten local laws be disallowed because the local government did not comply with the mandatory procedures for making local laws set out in section 3.12 of the *Local Government Act 1995* (**LG Act**).

3.5 As at the date of this report, the Legislative Council has disallowed six instruments in 2012 because of section 3.12 non-compliance. The motions to disallow four further instruments are scheduled to be debated in late November 2012.[13]

3.6 The Committee has recommended that the Government amend section 3.12 of the LG Act. This issue is further discussed at paragraphs 6.3 to 6.19 of this report.

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11 The number of disallowance reports (13) includes the *City of Perth Standing Orders Amendment Local Law 2012* (Report 55) as this was tabled. However, the number of instruments the Committee recommended disallowing (17) does not include the *City of Perth Standing Orders Amendment Local Law 2012* as the Committee's motion to disallow this instrument was withdrawn for the reasons noted in the Special Report. These figures include the yet to be tabled report and recommendation to disallow the *Nedlands Parking and Parking Facilities Local Law 2012*.

12 The Legislative Council has disallowed all instruments debated where the Committee recommended disallowance except three instruments referred to in the Hospital Parking Fees report, namely the *Queen Elizabeth II Medical Centre (Delegated Site) Amendment By-laws (No. 2) 2011*, *Royal Perth Hospital Amendment By-laws (No. 2) 2011*, and *Women's and Children's Hospitals Amendment By-laws (No. 2) 2011*. The Legislative Council is yet to debate the motions to disallow the *Metropolitan Region Scheme Major Amendment 1221/41: Banjup Urban Precinct* (Report 60) and the four instruments noted in footnote 13.

13 The Legislative Council is scheduled to debate the motions to disallow the *Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012* (Report 57) on 27 November 2012 and the *City of Vincent Dogs Amendment Local Law No. 2 2012* (Report 58), *City of Subiaco Meeting Procedures Local Law 2012* (Report 60) and *City of Nedlands Parking and Parking Facilities Local Law 2012* (report to be tabled) on 29 November 2012.

Annual Report 2011 **(Report 49)**

3.7 The Committee's *Annual Report 2011* contained one recommendation relating to Standards adopted in delegated legislation.

3.8 The Government Response to this recommendation is noted at paragraph 7.4 of this report.

Hospital Parking Fees: Queen Elizabeth II Medical Centre (Delegated Site) Amendment By-laws (No. 2) 2011, Royal Perth Hospital Amendment By-laws (No. 2) 2011, Women's and Children's Hospitals Amendment By-laws (No. 2) 2011, Fremantle Hospital Amendment By-laws (No. 2) 2011, Osborne Park Hospital Amendment By-laws (No. 2) 2011 **(Report 50)**

3.9 In Report 50 the Committee recommended that the five hospital amendment by-laws named above, which imposed hospital parking fees at six metropolitan hospital sites, be disallowed.

3.10 On 11 September 2012 the Legislative Council disallowed two of the five amendment by-laws the subject of Report 50 — the *Fremantle Hospital Amendment By-laws (No. 2) 2011* and *Osborne Park Hospital Amendment By-laws (No. 2) 2011*. This had the legal effect of reviving the previous by-laws (and previous parking fees) in relation to these hospitals.[14]

3.11 The motions to disallow the *Queen Elizabeth II Medical Centre (Delegated Site) Amendment By-laws (No. 2) 2011*, *Royal Perth Hospital Amendment By-laws (No. 2) 2011* and *Women's and Children's Hospitals Amendment By-laws (No. 2) 2011* were defeated.

Liquor Control Amendment Regulations (No. 10) 2011 **(Report 52)**

3.12 In Report 52 the Committee recommended that clause 6 of the *Liquor Control Amendment Regulations (No. 10) 2011*, which relates to the confiscation of passports, be disallowed.

3.13 On 13 September 2012 the Legislative Council disallowed the *Liquor Control Amendment Regulations (No. 10) 2011*.

3.14 The Committee also recommended in Report 52 that the Minister for Racing and Gaming amend the previous wording of Regulation 18G (once revived by the disallowance of clause 6) of the *Liquor Control Amendment Regulations (No. 10) 2011* in line with any amendments to section 126(2b) of the *Liquor Control Act 1988*,

[14] The *Osborne Park Hospital Amendment By-laws 2012* gazetted on 28 September 2012 amended the *Osborne Park Hospital By-laws 2007* to provide that no fee is payable for a permit at Osborne Park Hospital.

and that the Minister for Racing and Gaming amend section 126 of the *Liquor Control Act 1988* as outlined in the report.

3.15 The Government Response to these recommendations advised that the Government will consider these recommendations as part of the review of *the Liquor Control Act 1988*.[15]

The Ability to Conduct Electronic Meetings and the Trial of iPads by Committee Members (Report 56)

3.16 In the iPad report the Committee recommended that the Government provide tablet devices to members of Parliament to conduct electronic meetings.

3.17 As at 9 November 2012, the Government Response to this recommendation has not been tabled.

4 FEES AND CHARGES

4.1 The Committee continues to spend a significant amount of its time considering fees and charges (**fees**) imposed by delegated legislation.

Committee approach

4.2 In undertaking its role of scrutinising whether delegated legislation is authorised or contemplated by the empowering Act, as required by Committee term of reference (a), the Committee considers whether a fee for service in delegated legislation over recovers the cost of delivering the service.

4.3 In past years it was not uncommon for a Government department or agency (**department**) to increase fees in accordance with the Consumer Price Index rate (**CPI**) and not provide the Committee with any evidence that the fee did not over recover the cost of delivering the service or provide evidence of an appropriate cost recovery methodology. In past years, the Committee permitted CPI increases to fees while departments undertook cost reviews and established cost recovery methodologies.

4.4 The Committee has observed an increased understanding by departments that fees must be determined with reference to an appropriate cost recovery methodology.

4.5 In 2011 the Committee advised Ministers that all departments should develop a robust costing system of fees and charges prior to the end of the 2012 financial year. This

[15] Letter from Hon Terry Waldron MLA, Minister for Racing and Gaming, 9 October 2012: Legislative Council, Tabled Paper 5167.

advice reflected recommendations made by the Office of the Auditor General (**OAG**) in its *Second Public Sector Performance Report 2010.*[16]

4.6 In 2012 the Committee finalised its approach to the scrutiny of fees. The Committee now requires departments to demonstrate that fees do not over recover the cost of providing the service. Departments usually demonstrate that fees do not over recover the cost of providing the service and that there is a cost recovery methodology by advising a cost recovery percentage in a 'cost recovery percentage' column in the fee table in the Explanatory Memorandum provided to the Committee.

4.7 In May 2012 the Committee wrote to all Ministers advising that:

> *The Committee expects:*
>
> - *your agencies to have their costing systems/methodologies in place;*
> - *the costing systems/methodologies be described in detail in Explanatory Memoranda; and*
> - *the Fee Table, which forms part of the Explanatory Memoranda, to include a 'percentage of cost recovery achieved' column.*
>
> *… the Committee, as a general rule, will not take issue with departments and agencies with an appropriate costing methodology applying the Consumer Price Index rate to annual fee increases. However, this is contingent upon the department or agency demonstrating that the CPI increase does not result in the amended fee over-recovering the cost of delivering the service.*[17]

4.8 The Committee may request details of a department's costing methodology even if a department has advised a cost recovery percentage. The Committee may also conduct a hearing to further inquire into a department's costing methodology.[18]

4.9 The Committee will continue to closely scrutinise fees to ensure that departments do not over recover the cost of delivering fees for service and fees are authorised by laws enacted by the Parliament.

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16 Office of the Auditor General, Report 12, *Second Public Sector Performance Report* 2010, November 2010.

17 Letter from Joint Standing Committee on Delegated Legislation to Ministers, 22 May 2012, p1.

18 For example, on 26 March 2012 the Committee conducted a public hearing with Department of Health officers to obtain further information on the methodology relied on by the Department of Health to justify hospital parking fees imposed by delegated legislation.

Court fees

4.10 Since 2006 the Committee has had ongoing and increasing concerns regarding increases to court fees. It was in that year that court fees were the subject of adverse audit findings by the OAG. The OAG found a number of instances where court fees were significantly over recovering costs.

4.11 It was also in 2006 that the Committee first raised its concerns regarding increases to court fees with the then Attorney General. Since then, the Committee has continued to express its ongoing concerns with court fee increases. It reported those concerns to the Parliament in 2009 in its Report 32.[19]

4.12 In 2012 eight pieces of subsidiary legislation were published in the *Government Gazette* and referred to the Committee for scrutiny.[20]

4.13 On initial consideration of the instruments effecting the court fee increases, the Committee formed the view that it has not been provided with sufficient information to enable it to carry out its scrutiny role to determine whether the proposed fee increases were authorised or, alternatively, amounted to unauthorised taxes.

4.14 Numerous correspondence between the Committee and Hon Christian Porter MLA, the then Attorney General, followed in an attempt by the Committee to ascertain the basis of the fee increases. As in previous years in correspondence with the Committee in relation to court fee increases, the then Attorney General referred to a pilot project that was undertaken in the District Court in 2011. The aim of this pilot project was to examine the feasibility of conducting a detailed examination of individual fee rates and the costs involved in providing individual services.

4.15 The then Attorney General advised that the results of the project:

> *are currently being audited to ensure the appropriateness of the model developed and the accuracy of the resulting data. Once completed, this research will inform the development of government policy in relation to the setting of cost based individual fees.*[21]

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19 Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, May 2009.

20 *Children's Court (Fees) Amendment Regulations (No.2) 2011, Civil Judgments Enforcement Amendment Regulations (No.2) 2011, Coroners Amendment Regulations (No.2) 2011, District Court (Fees) Amendment Regulations (No.2) 2011, Evidence (Video and Audio Links Fees and Expenses) Amendment Regulations (No.2) 2011, Magistrates Court (Fees) Amendment Regulations (No.2) 2011, State Administrative Tribunal Amendment Regulations (No.5) 2011* and *Supreme Court (Fees) Amendment Regulations 2011*.

21 Letter from Hon Christian Porter MLA, Attorney General, 2 April 2012, p2.

4.16 The then Attorney General went on to state:

> *Given that I have not yet seen the results of the District Court fee pilot, I cannot comment on whether I support any change in direction in this area. Should I support a change in court fee policy, it is important to note that such a change would take several years to implement. A long lead time would be involved due to the variety of system, procedure and operational impacts that would need to be carefully dealt with.*[22]

4.17 The Committee is disappointed that the cost based fee pilot project has still not been finalised. In August 2012 the Committee wrote to the current Attorney General, Hon Michael Mischin MLC, advising that it expects this project to be finalised as a matter of urgency and the findings provided to it.

4.18 Although the Committee resolved to take no action in relation to the 2012 fee increases, it advised the Attorney General that future fee increases, in the absence of a finalised pilot project, will continue to attract close scrutiny.

5 REGULATIONS

5.1 Between 1 January 2012 and 9 November 2012, the Committee was referred 238 regulations. The Committee takes this opportunity to note issues raised in relation to the following unique instrument.

Education and Care Services National Regulations 2012

5.2 On 15 October 2012, the Committee finalised its scrutiny of four matters in the *Education and Care Services National Regulations 2012* (**National Regulations**). The regulations are significant given they arise out of a uniform scheme arrangement between all other States and Territories and are the first of their kind.

5.3 The Committee noted that section 39 of the *Education and Care Services National Law* titled '*Death of approved provider*' dealt with what happens to the estate of an approved provider who dies having made a Will, but two regulations in the National Regulations made under that enactment only referred to an '*executor*'. The National Regulations failed to cover the scenario of an approved provider who dies intestate. Hon Robyn McSweeney MLC, Minister for Child Protection, agreed in principle to an amendment to include the term '*administrator*'.[23]

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22 Ibid.

23 Letter from Hon Robyn Sweeney MLC, Minister for Child Protection, 4 October 2012. All responses from Hon Robyn McSweeney MLC, Minister for Child Protection, noted in this report are sourced from this correspondence.

5.4 The Committee was also concerned about the frequent use of the term '*parents*' in some places in the National Regulations and the dearth of references to '*family members*' which only appears five times.[24] The Committee took the view that it was important to give respect to Aboriginal and Torres Strait Islander parenting practices especially when section 3(3) of the *Education and Care Services National Law* states that two of the Guiding Principles of the national education and care services quality framework are —

> *(d) that Australia's Aboriginal and Torres Strait Islander cultures are valued; and*
>
> *(e) that the role of parents and families is respected and supported.*

5.5 Arguably, by taking into account Guiding Principle 3(d), everywhere the term '*parent*' is used in the National Regulations, the term '*family member*' could be inserted. However, the Committee recognised that this is not possible with respect to some regulations because the authorising section in the *Education and Care Services National Law* only uses the term '*parent*'; or is impractical with respect to some regulations. However, it may be possible in other locations such as regulations 31(c), 74(2)(b), 75(a), 80(1)(a), 80(2)(a) or 80(3)(a).

5.6 The Minister for Child Protection agreed in principle to various amendments.

5.7 The Committee also questioned the merit of amending regulation 92(3)(c) titled '*Administration of medication'* to include not only recording the name of medication to be administered but also what it is used to treat. The Committee considered the Guiding Principle in section 3(2)(a) of the *Education and Care Services National Law* which states that one of the objectives of the national education and care services quality framework is to '*to ensure the safety, health and wellbeing of children attending education and care services*'.

5.8 The Committee took the position that it was in the interests of child safety under the Guiding Principle (and particularly in the case of multiple medications for children being administered by non-medical childcare workers), that regulation 92(3)(c) be amended to include what the medication is used to treat. The Minister agreed in principle to an amendment.

5.9 The Committee also considered regulation 219(c) titled '*Suspension or removal of an Ombudsman*'. It states:

> *The Ombudsman Act applies as if it were modified —*

[24] In regulations 5(2)(f); 79(4); 80(4); 93(2) and the Note under regulation 160(3)(b)(iii).

(a) so that the provisions of the Act providing for the appointment of the Ombudsman and the conditions of service of the Ombudsman (other than the provisions providing for the resignation, retirement, suspension or removal of the Ombudsman and the appointment of an acting Ombudsman) do not apply; and

(b) to provide that a reference to the Education and Care Services Ombudsman is taken to be a reference to the person appointed to that office by the Ministerial Council with the remuneration, and on the terms and conditions, decided by the Council; and

(c) so that the Education and Care Services Ombudsman may be —

(i) suspended from office by the Ministerial Council without the need for a statement of the grounds of the suspension to be laid before a House of Parliament; and

(ii) removed from office by the Ministerial Council on the ground of misconduct or physical or mental incapacity without the need for an address being presented to a House of Parliament;

5.10 Constitutionally, the Committee had difficulty reconciling regulations 219(a), 219(c)(i) and (ii) with section 28(8) of the *Commonwealth's Ombudsman Act 1976*. Regulation 219(a) states that the subject matters of suspension or removal of an Ombudsman are exceptions to the ability to modify the Commonwealth's *Ombudsman Act 1976* under section 282(2)(b) of the *Education and Care Services National Law*. However, section 28(8) of the Commonwealth's *Ombudsman Act 1976* states that '*An Ombudsman shall not be removed or suspended from office except as provided by this section*.' The first seven sub-sections referred to there prescribe how the Commonwealth Ombudsman may be suspended or removed and involves, in sub-sections 1, 3, 4 and 5:

- the Governor General addressing the Parliament;
- the Minister causing a statement of the grounds of the suspension to be laid before each House of the Parliament after the suspension;
- the House by resolution, declaring that the Ombudsman should be removed; and

- if each House passes such a resolution, the Governor-General removes the Ombudsman,

yet sub-regulations 219(c)(i) and (ii) expressly omit a statement of grounds, and an address to the Parliament.

5.11 At first glance, sub-regulations 219(c)(i) and (ii) appeared to be inconsistent with section 28(8) of the Commonwealth's *Ombudsman Act 1976* and thus void pursuant to section 43 of the *Interpretation Act 1984*. The Committee took the position that even if the question of inconsistency could be explained, the lack of accountability to the Western Australian Parliament raised sovereignty issues for all of the Parliaments participating in the national scheme by not requiring these mechanisms.

5.12 Members of Parliament have significant interest in the suspension or removal of an Ombudsman, especially one dealing with children. The Committee was concerned at the lack of accountability in sub-regulations 219(c)(i) and (ii) for communicating suspension or removal to the Western Australian Parliament, seeing this as a fundamental diminishing of the role of our Parliament.

5.13 Western Australia's own *Parliamentary Commissioner Act 1971* prescribes such mechanisms. Section 6 allows for the Governor to suspend a Commissioner or Deputy Commissioner and the person cannot be restored to office unless a statement of the grounds of suspension is laid before each House of Parliament and each House then passes an address praying for removal. This is similar to the process prescribed in section 28 of the Commonwealth's *Ombudsman Act 1976*.

5.14 The Committee requested the Minister for Child Protection clarify how regulation 219(a), sub-regulations 219(c)(i) and (ii) as well as section 28(8) of the Commonwealth's *Ombudsman Act 1976* interact as well as the Minister for Child Protection's response to the view that there may be an inconsistency. The Minister for Child Protection said she would raise this matter with the Regulatory Authority as it has inter-jurisdictional significance.

6 LOCAL LAWS

6.1 Between 1 January 2012 and 9 November 2012, the Committee was referred 96 local laws.

6.2 The Committee takes this opportunity to summarise a few issues of concern raised by the Committee in 2012.

Section 3.12 of the *Local Government Act 1995*

6.3 The Committee continues to identify many occasions where local governments do not correctly follow the strict mandatory procedures for making local laws set out in section 3.12 of the LG Act. A copy of section 3.12 is attached at Appendix 1.

6.4 In 2012 nine reports recommended disallowance of ten instruments because local governments did not comply with section 3.12 of the LG Act.

6.5 Section 3.12(1) of the LG Act provides:

> *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.*

6.6 Therefore, if the steps set out in section 3.12 of the LG Act are not followed exactly in the order in which they are outlined, then the requirements of the LG Act have not been correctly complied with and the local law is not validly made.

6.7 The law is clear. In these circumstances the Committee has no option but to recommend disallowance, even if the non-compliance with section 3.12 is trivial and does not impact on the integrity of the local law.

6.8 To give an example of a trivial non-compliance that results in a law being invalid, section 3.12(3)(b) of the LG Act requires the local government to give a copy of the proposed local law and a copy of the Statewide notice of the local law (the law includes the requirement that the notice be published in a newspaper that circulates throughout the State) to the Minister for Local Government '*as soon as the notice is given*'. A local government officer may arrange for the notice to be in the newspaper (perhaps later that week) and forward a copy of the notice and proposed local law to the Minister for Local Government on the same day. If the Statewide notice appears in the newspaper one day after the Minister for Local Government receives the documents, the law is invalid.

6.9 The Committee was disappointed to read the following comments in the minutes of the Council of the Shire of Kellerberrin's meeting on 17 July 2012, relating to the Committee's decision to recommend the disallowance of the *Shire of Kellerberrin Parking and Facilities Local Laws 2011* because the Shire did not comply with section 3.12 procedures:

> *Unfortunately, the bureaucrats who justify their existence in the policing of such matters as the adoption of Local Laws take a very dim view if there is any wavering from the compliance checklist.*[25]

6.10 The Committee takes this opportunity to again emphasise that when section 3.12 procedures are not complied with, the local law is invalid – this is the law – and the Committee has no option but to recommend disallowance. Long-standing advice from

[25] Shire of Kellerberrin, Minutes of the Ordinary Council Meeting, 17 July 2012, p100.

the then Crown Solicitor's Office (now State Solicitor's Office) in January 2002 confirmed that the procedure in section 3.12 is mandatory.[26]

6.11 Hon John Castrilli MLA, Minister for Local Government, is also of the view that local laws should be disallowed where a local government has failed to comply with the local law making process.[27]

6.12 The Committee is concerned that recommending disallowance of a local law in circumstances where section 3.12 is substantially complied unnecessarily impacts on the Committee, Parliament and local government time and resources.

6.13 The Committee recommended in Report 48, *Town of Kwinana Extractive Industries Local Law 2011*, and Report 51, *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*, that:

> *the Minister for Local Government amend the Local Government Act 1995 to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of the local law.*

6.14 The Minister for Local Government in the Government Response to Report 51 advised that:

> *The Committee's recommendation will be taken into consideration when amendments to the Act are progressed in 2013.*[28]

6.15 The Minister for Local Government also advised that:

- An updated Statutory Procedures Checklist (which local governments follow when making a local law) has been prepared for local governments regarding the local law-making process. The checklist has been amended to remove any ambiguity as to how the process should be completed.

- A Department Circular has been issued to all local governments emphasising that compliance with section 3.12 of the LG Act is a statutory requirement, not a mere administrative process.

- The Department of Local Government has also made procedural changes. When a compliance issue is identified regarding a proposed local law, the

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26 The advice dated 31 January 2002 is copied in Appendix 4 to Report 42, Joint Standing Committee on Delegated Legislation, *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and *Shire of Koorda Standing Orders Local Law 2009*, September 2010.

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

28 Letter from Hon John Castrilli MLA, Minister for Local Government, 10 September 2012, p1: Legislative Council, Tabled Paper No. 4904.

department will advise the local government to restart the law-making process.[29]

6.16 The Minister for Local Government expressed the view that the above changes will ensure that local governments comply with the law-making process and that potentially invalid laws are not gazetted. The Minister advised that he will continue to monitor this issue.[30]

6.17 The Committee anticipates that these procedural changes will result in significantly fewer invalid local laws being referred. However, until section 3.12 of the LG Act is amended, the Committee has no choice but to continue to recommend disallowance of a local law which has not strictly followed section 3.12.

6.18 The onus of responsibility with respect to understanding and following the correct procedure set out in section 3.12 of the LG Act lies with local governments.

6.19 The Committee remains of the view that section 3.12 should still be amended as recommended in Reports 48 and 51.

Activities on Thoroughfares and Public Places and Trading Local Laws

6.20 The Committee took issue with clause 6.18 in the *City of Albany Activities on Thoroughfares and Public Places and Trading Local Law 2011*.

6.21 Clause 6.18 states:

> ***6.18 Obligations of permit holder***
>
> *(1) The permit holder for a facility* [defined as meaning an outdoor eating facility or establishment on any part of a public place but does not include such a facility or establishment on private land] *shall—*
>
> *(a) ensure that the facility is conducted at all times in accordance with the provisions of this local law;*
>
> *(b) ensure that the eating area is kept in a clean and tidy condition at all times;*
>
> *(c) maintain the chairs, tables and other structures in the eating area in a good, clean and serviceable condition at all times;*

[29] Ibid, pp1-2.

[30] Ibid, p2.

> *(d) ensure a minimum width of 1.8 metres is kept clear for pedestrian access between 8.00 am and 6.00 pm each day or 0.8 metres at all other times;*
>
> *(e) define the eating area to the satisfaction of the local government;*
>
> *(f) be solely responsible for all and any costs associated with the removal, alteration, repair, reinstatement or reconstruction of any part of the public place arising from the conduct of the facility; and*
>
> *(g)* ***be solely responsible for all rates and taxes levied upon the land occupied by the facility***. [Committee emphasis]

6.22 The Committee queried the reasonableness of 6.18(1)(g) - that the permit holder '*shall be solely*' responsible for '*all*' rates and taxes levied upon what is a public place and not the eating facility owner's private land. This begged the question of whether the local government owns the footpath outside the premises. The '*owner*' has to pay for a permit, and then pay all rates and taxes, when the owner is only using the place on business days, not at all times.

6.23 Local government land is Crown land and not rateable. However, if it is leased, or a licence or permit is issued, then it can be rated pursuant to section 6.44(1) of the LG Act which states:

> ***6.44. Liability for rates or service charges***
>
> *(1) The owner for the time being of land on which a rate or service charge has been imposed is liable to pay the rate or service charge to the local government.*

6.24 Under section 6.44, the permit or lease holder or licensee becomes an '*owner*' and, because the footpath land is expressly rateable under the LG Act, the reference in (g) of the City's Local Law (and in many other local laws) is superfluous. The Committee discussed this with the Western Australian Local Government Association (**WALGA**) who responded:

> *The Association agrees with the Committee's view on clause 6.18(1)(g) of the above Local Law, in relation to the operation of section 6.44 of the Local Government Act.*
>
> *WALGA will raise awareness of this issue by informing its Local Laws Service members by provision of an InfoPage Circular.*

> *The necessary amendment to the model Activities in Thoroughfares and Public Places and Trading Local Law has been effected. The Local Laws Manual will be updated in the coming months, ensuring that all members have access to contemporary versions of this and other model and template Local Laws.*[31]

Standing Orders Local Laws

6.25 The Committee took issue with declaration of due consideration and disclosure of interest clauses in standing orders local laws.

6.26 Clause 5.9 of the *City of Swan Standing Orders Local Laws 2010* provided:

> ***Declarations of Due Consideration***
>
> *Any member who is not familiar with the substance of any report or minute or other information provided for consideration at a council or committee meeting is to declare that fact at the time declarations of due consideration are called for in the order of business at the meeting, or otherwise before the meeting considers the matter. In the event that any members makes such a declaration, the relevant matter is to be stood down for later consideration at that meeting so as to allow an opportunity for the member making the declaration to become familiar with the relevant report or minutes or other information. If the delay in consideration of the matter has not allowed sufficient time for the member to give due consideration to the matter, unless the member satisfies the presiding person that he or she can pass an informed vote,* ***the member should leave the chamber*** *before the matter is put to a vote*. [Committee emphasis]

6.27 The Committee was of the view that the better argument was that '*should*' in this local law conveyed a preference, set a standard of behaviour or indicated an obligation that the Councillor (member) leave the meeting.

6.28 The Committee took issue with clause 5.9 (and Part 13) of this local law on the basis that these clauses were an unreasonable exercise of the power to make these local laws provided in section 3.5 of the LG Act, were legislated for an improper purpose in suggesting how democratically elected councillor should behave and when they should leave a meeting, and were inconsistent with provisions in, and the scheme of, the LG Act.

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[31] Letter from Mr Ricky Burges, Chief Executive Officer, Western Australian Local Government Association, 12 June 2012.

6.29 The Committee noted that sections 2.7 and 2.10 of the LG Act prescribe the role of the democratically elected Council and Councillors and section 5.25(1)(h), which authorises the Governor to make regulations to exclude a person from a meeting '*whose conduct is not conductive to the proper conduct of the meetings*', implies that only the Governor can make law excluding persons from meeting. The LG Act contemplates Councillors being present and meetings and voting (subject to their disclosing any financial or proximity interest) and does not include any requirement on how they exercise that vote.

6.30 The Committee also noted that *Local Government (Rules of Conduct) Regulations 2007*, at regulation 3, prescribes general principles to guide member behaviour (expressly not rules of conduct) including that a council member should act with reasonable care and diligence, avoid damage to the reputation of the local government and base decisions on relevant and factually correct information.

6.31 The Committee takes particular issue with any clause in a local law prescribing when a democratically and validly elected Councillor should leave a meeting. A local law suggesting when a councillor should leave a meeting is contrary to the theory of democratic representative government upon which local government is based.

6.32 In the Committee's view, the principles in the LG Act and associated regulations do not authorise or contemplate local laws prescribing circumstances where a member should leave a meeting and not vote on a matter because the presiding member does not consider them informed.

6.33 This view is consistent with principles previously expressed by this Committee and its predecessor Committee. The Committee has long history of taking issue with any clause that prescribes when a Councillor shall leave a meeting, shall not take further part in a meeting or shall not vote at a meeting.[32]

6.34 The Committee also took issue with Part 13 'Disclosure of interest affecting impartiality' of the *City of Swan Standing Orders Local Laws 2010* for reasons similar to those raised in relation to clause 5.9.

6.35 Part 13 of the local law repeats many requirements relating to disclosure of interest in the LG Act but provided further prescriptive '*guidance*' on the meeting disclosure process where an interest affecting impartiality arises, including stating when a Council member '*should*' leave the meeting room.

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[32] For example, see Joint Standing Committee on Delegated Legislation, Report 41, *Shire of Dardanup Standing Orders Local Law 2009*, August 2010; Report 38, *Issues of concern raised by the Committee between 1 May 2009 and 31 December 2009 with respect to Local Laws*, April 2010, pp10-13; Report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, August 2004, pp13 to 14; Report 8, *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, April 2004, pp3-4; and Report 4, *City of Perth Code of Conduct Local Law*, September 2002, pp18-32.

6.36 The Committee considered the legislative scheme relating to member interests. Part 5, Division 6 of the LG Act deals with disclosure of financial interests and sections 5.67 to 5.69 prescribe the exceptions to the rule that a Council member who has financial or proximity interest in a matter (as defined in the LG Act) must not participate in meetings.

6.37 Further, the *Local Government (Rules of Conduct) Regulations 2007*, at regulation 11, provides procedures to be complied with when a Council member has an interest affecting impartiality (this regulation does not apply to a financial or proximity interest), including the requirement to disclose and give notice of the interest. It is relevant that the regulations do not suggest that a Council member who has such an interest affecting impartiality must or should leave a meeting.

6.38 The Committee is of the view that any law requiring or suggesting that a Council member leave a meeting, if considered appropriate for policy reasons, should be in the LG Act.

6.39 The Committee concluded that the *City of Swan Standing Orders Local Laws 2010* offended Committee terms of reference (a) and (f). At the Committee's request, the City of Swan provided an undertaking to delete clause 5.9 and Part 13 of the local law.

6.40 The Committee also took issue with clause 11.13 (Other Persons to Disclose Impartiality Interests) in the *Town of Cottesloe Standing Orders Local Law 2012*. This clause prescribed the disclosure requirements where a local government employee or member of a committee who is not the Mayor or a Councillor has an interest affecting impartiality.

6.41 The Committee considered the legislative context in which the clause operates including the LG Act, *Local Government (Rules of Conduct) Regulations 2007* (noted above) and the *Local Government (Administration) Regulations 1996.*

6.42 Regulation 34C of the *Local Government (Administration) Regulations 1996* mandates that particular requirements relating to employee interests affecting impartiality must be contained in a local government's Code of Conduct. The *Town of Cottesloe Code of Conduct*, at clause 2.3, prescribes the employee disclosure of interest requirements as required by regulation 34C, which clause 11.13 repeated. This gave these requirements the legislative force and enforceability of a local law.

6.43 The Committee is of the view regulation 34C of the *Local Government (Administration) Regulations 1996* implies that employee disclosure of interests requirements are be prescribed in a local government's code of conduct, and only in a code of conduct. When read in the context of the legislative scheme dealing with disclosure of interests, the legislators' decision to regulate employee's disclosure of interest in a code of conduct was considered and deliberate. In the Committee's view, clause 11.13 was not authorised or contemplated by the LG Act. This view is

consistent with the view expressed in Report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, where the previous Committee noted its objection to local governments incorporating their codes of conduct into their standing orders local law.[33]

6.44 At the Committee's request, the Town of Cottesloe agreed to delete clause 11.13 from the *Town of Cottesloe Standing Orders Local Law 2012*.

Airport Local Laws

6.45 The Committee's scrutiny of the *City of Busselton Regional Airport Local Law 2012* provided the Committee with a unique opportunity to consider an airport local law.

6.46 The Committee took issue with clauses 2.2 (Requirement for a permit by flight training operators) and 4.4(3)(b) of this local law.

6.47 Clause 2.2 provided:

> *(1) A flight training operator —*
>
> *(a) must not, without a permit, use the Airport; and*
>
> *(b) may use the Airport only in accordance with the terms and conditions of a permit. …*
>
> *(3) In this clause — …*
>
> *(b) the use of the Airport by a flight training operator includes the use of the Airport for landing or taking off purposes.*

6.48 The Committee considered the definition of '*use of the Airport*' vague and uncertain as it implied that a flight training operator permit may be required in circumstances other than when a flight training operator uses the Airport for the purpose of landing or taking off. The Committee was of the view that a clear and exhaustive definition of '*use of the Airport*' was required as this would clearly set out the scope of this clause which operates in a complex regulatory environment, which includes a number of Commonwealth aviation laws and regulation imposed by the Civil Aviation Safety Authority (**CASA**) and other aviation agencies. The Committee sought the advice of CASA, who agreed that the definition of '*use of the Airport*' in clause 2.2(3)(b) was '*not clear as it may mean something other than landing of taking off*'.[34]

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33 Joint Standing Committee on Delegated Legislation, Report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, August 2004, pp1-2.

34 Letter from Ms Carolyn Hutton, Manager, Corporate Relations Branch, Civil Aviation Safety Authority, 5 June 2012, p1.

6.49 At the Committee's request, the City of Busselton agreed to delete clause 2.2(3)(b) and insert:

> *The use of the Airport by a flight training operator means the use of the Airport for, or in relation to —*
>
> *(a) landing or taking off in an aircraft; or*
>
> *(b) flight training activities on the Airport Land.*

6.50 Clause 2(1)(b) also provides that a flight training operator '*may use the Airport only in accordance with terms and conditions of a* [local government] *permit*'. The Committee accepted the proposal from the City of Busselton to note in its Working Version of the local law the requirement that permit terms and conditions comply with Commonwealth aviation laws and regulation.

6.51 The Committee also took issue with clause 4.4(3)(b). Clause 4.4 (Animals) provided:[35]

> *(2) A person must not without prior written approval of the Airport Manager or an approved person—*
>
> *(a) bring an animal to the Airport;*
>
> *(b) permit an animal to stray into the Airport; or*
>
> *(c) have an animal in his or her possession or control at the airport.*
>
> *(3) Where there is a breach of subclause (2), or where an animal is otherwise found at the Airport, the Airport Manager or an authorised person —*
>
> *(a) may, using reasonable means, capture and remove the animal for the Airport; and*
>
> *(b) may, where the Airport Manager or authorised person considers that the animal is or may be a danger to persons or property, destroy the animal.*

6.52 The Committee considered that the power to destroy animals appeared to inconsistent with section 16 of the *Wildlife Conservation Act 1950* and also questioned the subclause providing the power to destroy an animal that represents a risk to any

[35] This clause does not apply to guide dogs or animals being airfreighted.

property at the airport alone, without the requirement that this risk to property also represent a risk to persons.

6.53 Section 16 of the *Wildlife Conservation Act 1950* provides that it is an offence to kill '*protected fauna*' (essentially wildlife) unless under the authority of a licence issued under the Act.[36] Airports liaise with Department of Environment and Conservation (**DEC**) officers to deal with wildlife risks and obtain DEC licences authorising the killing of wildlife under state law.[37]

6.54 Hon Bill Marmion MLA, Minister for Environment, advised the Committee that he agreed that clause 4.4(3) of the local law seemed to be in conflict with section 16 of the *Wildlife Conservation Act 1950*. The Minister for Environment was of the view that clause 4.4(3) was capable of being reconciled with the *Wildlife Conservation Act 1950* if the clause was amended to refer to the clause being subject to the licensing requirement in the *Wildlife Conservation Act 1950*. [38]

6.55 The City of Busselton agreed to delete clause 4.4(3)(b) and insert a clause deleting the reference to property in the clause and stating that the authority to destroy the animal is subject to provisions in the *Wildlife Conservation Act 1950*.

Discretionary power of swimming pool managers and attendants

6.56 In the reporting period the Committee came across two local laws that purported to give swimming pool managers and attendants a discretionary power to admit persons to the pool area in circumstances regarding:

- minimum age of entry to a pool facility for children accompanied by an older person; and
- persons suffering from any contagious, infectious or cutaneous disease or complaint, or being in an unclean condition; or under the apparent influence of alcohol, drugs or alcohol and drugs.

6.57 The two local laws were a deviation from the WALGA pro forma or template law which makes it mandatory for managers to refuse admission in these circumstances.

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36 This offence is also subject to other exceptions noted in section 16 of the *Wildlife Conservation Act 1950* including when the Minister for Environment has declared that '*fauna*' (as defined in the Act) is not protected.

37 DEC licences issued under regulation 4 of the *Wildlife Conservation Act 1950* authorise the taking (killing) of fauna in accordance with the conditions noted in the particular licence for the duration of the licence. Commonwealth regulation also deals with managing animal hazards at airports including the CASA *Advisory Circular Wildlife Hazard Management at Aerodromes* (July 2011) and CASA *Manual of Standards.* Clause 10.6 of the CASA *Advisory Circular Wildlife Hazard Management at Aerodromes* provides that '*Appropriate approval should be obtained from the relevant authorities before treatment* [including culling] *commences. Personnel should be properly trained and qualified in the use of the treatment*'.

38 Letter from Hon Bill Marmion MLA, Minister for Environment, 17 July 2012, p1.

6.58 The Committee noted that entry to pools is not covered in the *Health (Aquatic Facilities) Regulations 2007* but notably, such clauses conflict with the Department of Health's '*Code of practice for the design, operation, management and maintenance of aquatic facilities*', a Code adopted pursuant to regulation 6 of the *Health (Aquatic Facilities) Regulations 2007*.[39] It states:

> ***7.9 MINIMUM ENTRY AGE***
>
> *The operator of an aquatic facility* ***shall ensure*** *that children under 10 years of age* ***are not permitted to enter*** *the facility unless under the supervision of a person 16 years or older, in accordance with Guideline SU 1.11 – Parental Supervision - 1996 of the Pool Safety Guidelines. Waterslides are exempted from complying with 4.2 of this guideline.* [Committee emphasis]

6.59 Under the Code, a Manager lacks discretionary power to admit persons to a facility which would include the pool area for children who are under 10. The discretion is thus inconsistent with a Code which has been incorporated in *Health (Aquatic Facilities) Regulations 2007*.

6.60 Clauses which authorise discretion to admit persons suffering from a contagion or infection are another deviation from WALGA's pro forma.[40] Such a clause is inconsistent with regulation 24 of the *Health (Aquatic Facilities) Regulations 2007* which states:

> ***Division 1 — Hygiene and use of facilities***
>
> ***24. Certain persons not to enter or use water body***
>
> *(1) A person* ***must not*** *enter or use, or attempt to enter or use, a water body of an aquatic facility if the person is —*
>
> *(a) suffering from any gastrointestinal disease, skin infection or other disease that is communicable in an aquatic environment; or*
>
> *(b) in an unclean condition; or*
>
> *(c) wearing unclean clothes; or*

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39 It states: '*(1) The Code is adopted to the extent to which it is applied by these regulations. (2) These regulations prevail over the provisions of the Code to the extent to which the provisions of the Code are inconsistent with these regulations*'.

40 It states: '*When entry must be refused. 5.1 A Manager or an authorized person shall refuse admission to, may direct to leave or shall remove or cause to be removed from a pool area any person who – (a) in her or his opinion is - … (ii) suffering from any contagious, infectious or cutaneous disease or complaint, or is in an unclean condition; or (iii) under the influence of liquor or a prohibited drug*'.

> *(d) under the apparent influence of alcohol, drugs or alcohol and drugs;* [Committee emphasis]

6.61 '*Water body*' in these regulations means '*a spa pool, swimming pool, swimming bath, water slide, wave pool, and any other aquatic amenity or facility that is controlled or used by or in connection with any club, school, business, association or body corporate*.' Regulation 24 thus contemplates that persons with infections or contagions cannot enter either a facility (in this case a pool area) or the water whereas the clauses in the two local laws provided the Manager or Attendant with a discretionary power to admit such persons.

6.62 The Committee is of the view that such clauses are inconsistent with:

- a Code which has been incorporated in *Health (Aquatic Facilities) Regulations 2007*; and
- regulation 24 of the *Health (Aquatic Facilities) Regulations 2007*.

6.63 The Committee will continue to request local governments amend such clauses to remove the discretion.

Local Laws' enacting formulae

6.64 The Committee has observed a significant deviation from WALGA's pro forma laws in the way the enacting formula (called the 'preamble' by the Department of Local Government) is being drafted.

6.65 WALGA's pro forma laws contain an enacting formula in the following terms. The Committee has used a dog local law pro forma to illustrate the point:

> *Under the powers conferred by the Dog Act 1976 and under all other powers enabling it, the Council of the [insert name of local government] resolved on [insert date] to* ***make*** *the following local law.* [Committee emphasis]

6.66 However, in three local governments' local laws in this reporting period, the Committee noted that the enacting formula uses the term '*adopt*' a local law rather than '*make*' a local law. Thus, for example:

> *Under the powers conferred by the Dog Act 1976, the Local Government Act 1995 and under all other powers enabling the local government, the City of Kalgoorlie-Boulder resolved on 8 October 2012 to* ***adopt*** *the following local law by an absolute majority resolution.*

6.67 The language of section 3.12 of the LG Act does not use the term '*adopt*' which has a particular meaning in other sections of the LG Act.[41] The correct term is to '*make*' a local law.

6.68 In Report 8 the former Committee said:

> *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.*

6.69 In Report 23, the former Committee said of a drafting error in the enacting formula of the *Tamala Park Regional Council - Standing Orders Local Law 2006*:

> *The local law did not state the date the Council resolved to make the local law. The Committee wrote to the Council requesting that this error be corrected when the local law was next amended. The enacting formula does not form a part of local laws and has no effect on the meaning of local laws.*

6.70 The *Local Laws Local Government Operational Guidelines - Number 16 September 2006* makes it clear that the correct term is '*make*' a local law.

6.71 As stated above, the Committee has not taken issue with local governments' enacting formulae as it does not form a part of a local law and has no effect on the meaning. However, the Committee reiterates its view that it is clearly best drafting practice to use the language of section 3.12 rather than local council resolution language.

6.72 WALGA stated that it does not have a particular position on this matter, but agrees that the term '*make*' is more appropriate terminology.[42] The Committee's preference is that local governments use the following example of an enacting formula contained in the *Local Laws Local Government Operational Guidelines - Number 16 September 2006* laws.

> *Under the powers conferred by the Local Government Act 1995 and under all other powers, the Council of the Shire of Treetops resolved on 28 May 2006 to make the Shire of Treetops Repeal Local Law 2006.*[43]

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41 For example, in section 8(1)(a) which states '*Local laws may adopt codes etc. (1) A local law made under this Act may adopt the text of — (a) any model local law, or amendment to it, published under section 3.9.*'

42 Electronic mail from Mr James McGovern, Manager Governance, Western Australian Local Government Association, 6 November 2012.

43 The Department of Local Government, *Local Laws Local Government Operational Guidelines - Number 16 September 2006*, p5.

6.73 Further, the Committee takes no issue with the enacting and concluding formulae in local laws referring to the '*Council of the City, Shire or Town*.' The Committee's previously stated view that local laws should use the term '*local government*' rather than '*City*', '*Shire*' or '*Town*' refers to the substantive text of the local law. It does not extend to the enacting and concluding formulae which should refer to the '*Council*'.

Local Laws Working Group

6.74 The Local Laws Working Group, a group comprising of representatives from the Office of the Minister for Local Government, Department of Local Government, Local Government Managers' Association (Western Australia), WALGA, Department of Health, DEC and Committee members and staff, met on 13 March 2012. This forum provided an opportunity for participants to discuss local law issues of concern including issues commented on in this report.

7 STANDARDS

7.1 The Committee remains concerned about the accessibility of standards published by Standards Australia adopted in delegated legislation. As noted in the Committee's *Annual Report 2011*, it is an important principle that people have a right to know the law that they are obliged to comply with.

7.2 Standards adopted in delegated legislation are not publicly accessible in the same way that Acts and regulations are readily accessible online at no cost to the public.

7.3 The Committee recommended in its *Annual Report 2011* that:

> *The Government requires departments, agencies and local governments to advise on their internet site where standards called up in subsidiary legislation can be accessed at no cost.*

7.4 The Government Response to this recommendation was:

> *The Government notes that Committee's recommendation and will consider the merit of its implementation.*[44]

7.5 On the basis of the disappointing Government Response, the Committee re-affirms its recommendation and requests a determinative response to the following:

Recommendation 1: The Committee recommends that the Government requires departments, agencies and local governments to advise on their internet site where standards called up in subsidiary legislation can be accessed at no cost.

[44] Letter from Hon Colin Barnett MLA, Premier, undated: Legislative Council, Tabled Paper 4861.

7.6 The Committee often raises the issue of public access to standards with departments and local governments when writing to them about a particular instrument.

7.7 The Committee was pleased with the City of Cockburn's recent response that it would purchase copies of a standard adopted in a particular local law and make the standard available at its main administration building and at three public libraries.

7.8 The Committee expects departments and local governments to make standards adopted in local laws more accessible to the public, and to advise on their websites where adopted standards can be accessed at no cost.

7.9 It would also assist the Committee if departments and local governments advised the Committee in the Explanatory Memorandum provided with delegated legislation where standards adopted in the relevant delegated legislation can be accessed at no cost and if this information is provided on its website.

8 CONCLUSION

8.1 In undertaking its function of scrutinising the large volume of delegated legislation within the time constraints imposed on it the Committee relies on the assistance provided by relevant Ministers, departments and local governments.

8.2 The Committee takes this opportunity to thank the Ministers, departments and local governments who provide assistance to the Committee.

8.3 The Committee appreciates the work performed by local governments who, often with limited resources, undertake the difficult challenge of drafting local laws, and the contribution of the Department of Local Government and WALGA in drafting local laws.

8.4 The Committee commends its report to the House.

Mr Paul Miles MLA
Chairman

15 November 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.