THIRTY-NINTH PARLIAMENT

REPORT 70

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2013

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

December 2013

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:

"**6. Joint Standing Committee on Delegated Legislation**

6.1 A *Joint Standing Committee on Delegated Legislation* is established.

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

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

6.4 (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.

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

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

(a) is 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.

6.7 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 an 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.

6.8 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*."

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chairman)
Hon John Castrilli MLA
Hon Peter Katsambanis MLC
Ms Simone McGurk MLA
Hon Ljiljanna Ravlich MLC (Deputy Chair) until 16 October 2013
Hon Robin Chapple MLC (Deputy Chair) from 16 October 2013
Hon Mark Lewis MLC
Mr Peter Watson MLA

Staff as at the time of this inquiry:

Felicity Mackie (Advisory Officer (Legal))
Anne Turner (Advisory Officer (Legal))
Stacey Martin (Committee Clerk)
Alex Hickman (Advisory Officer (Legal))
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IN RELATION TO THE

ANNUAL REPORT 2013

EXECUTIVE SUMMARY

1 This *Annual Report 2013* outlines the activities of the Joint Standing Committee on Delegated Legislation (**Committee**) in 2013 and comments on significant issues arising from the Committee's scrutiny of delegated legislation in 2013.

2 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider all instruments of subsidiary legislation that are published, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law.

3 It undertakes this consideration pursuant to its Terms of Reference, the current version of which took effect when they were adopted by Parliament on 23 May 2013.

4 The Committee continues to scrutinise a large number of instruments of delegated legislation. Between 1 January 2013 and 29 November 2013, the Committee was referred 476 instruments including 320 regulations and 64 local laws.

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

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

ANNUAL REPORT 2013

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1 INTRODUCTION

Overview

1.1 This *Annual Report 2013* outlines the activities of the Joint Standing Committee on Delegated Legislation (**Committee**) in 2013 and comments on significant issues arising from the Committee's scrutiny of delegated legislation.

1.2 The Committee's first meeting took place on 10 June 2013 due to the need for Parliament to re-establish committees after the State Election in March 2013. A significant portion of the reporting period occurred during the lead up and following the State Election.

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

1.4 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.

1.5 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 is local laws made by local governments. The Committee also considers delegated legislation made by statutory bodies and boards.

Committee Members

1.6 In 2013 the Committee was served by members noted on the inside cover of this report. Hon Ljiljanna Ravlich MLC served as Deputy Chair until 16 October 2013. On the same date, Hon Robin Chapple MLC was appointed as Deputy Chair.

Terms of Reference

1.7 The Committee's Terms of Reference are noted on the inside cover of this report and were amended following a review of the Legislative Council Standing Orders. They took effect when adopted by the Parliament on 23 May 2013.

Reporting to Parliament on notices of motion to disallow

1.8 Term of Reference 6.4(b) is a new term of reference. Its intention is to allow the Committee to articulate a range of views, where reasonable minds differ about important questions, including those involving public policy. This enables the Houses to be fully informed, based on the Committee's inquiries, and leaves the Houses to form their own views on the relevant questions.

1.9 An example of how the Committee has applied this particular Term of Reference can be seen in Report 67, regarding the *City of Fremantle Plastic Bag Reduction Local Law 2012* discussed at paragraphs 7.13 to 7.18.

Factors the Committee enquires into when considering an instrument

1.10 Former term of reference 3.6 has been consolidated into four considerations set out in terms of reference 6.6(a) to (d).

1.11 In its report on the review of the Standing Orders, the subcommittee of the Standing Committee on Procedure and Privileges stated:

> *The Subcommittee noted that the current wording of the JDLC's term of reference 3.6 was unnecessarily complex and contained terminology and concepts not readily definable or understood by non-lawyers.*
>
> *At its most basic, the role of the JDLC has always been to inquire into whether an instrument of subsidiary legislation is: made under an identified power; has no unintended effects; allows for a review where one would normally be expected; and is in all other respects appropriate as legislation made under a delegation by the Parliament. These are the key concepts that it is important that organisations dealing with the JDLC fully understand and are able to practically comply with. The Subcommittee therefore proposes to set these concepts out in as clear and plain language as possible.*
>
> *The Subcommittee has therefore recommended a simplified, plain English, form of words that retains the substance of the current wording of term of reference 3.6. The recommended wording for*

new term of reference 6.6 is also based on the original terms of reference of the JDLC during the 1980s.[1]

1.12 In practice, the change in wording of this term of reference has not had any significant impact on the way that the Committee scrutinises instruments of subsidiary legislation.

Self-initiated inquiries

1.13 The Committee has encountered a number of issues which may be classified as 'systemic'. An example is the statutory procedure for making local laws pursuant to section 3.12 of the *Local Government Act 1994* and highlighted in a number of reports.[2] The Committee welcomes this new term of reference and anticipates utilising it to undertake appropriate inquiries and report to Parliament.

2 COMMITTEE ACTIVITIES

2.1 The Committee held 14 meetings in 2013.[3] A breakdown of the Committee's activities in 2013, noting instruments referred up until 29 November 2013, follows.

1 Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 22, *Review of the Standing Orders*, 20 October 2011, p17.

2 See Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 48, *Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012; Western Australia, Legislative Council, Report 51, *Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012; Western Australia, Legislative Council, Report 61, *Annual Report 2012*, 15 November 2012, pp14-17.

3 The first meeting was held on 10 June 2013 and this figure includes the meeting scheduled to be held on 11 December 2013.

Disallowable instruments referred	476
Regulations referred	320
By-laws (all by-laws were made by the Executive)	18
Local laws made by local government	64
Rules referred	22
Other instruments referred (including Metropolitan Regional Schemes, orders, notices and plans)	52
Notices of motion for disallowance given	32
Notices of motion for disallowance withdrawn	26
Hearings held by the Committee	2
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Reports tabled in 2013	8
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Committee process

2.2 When the Committee has questions about an instrument 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.

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

2.4 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 *Notice of Motion* to recommend disallowance of the instrument in the Legislative Council. This is 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 the Parliament.

2.5 When requested undertakings are provided, the usual course is for the Committee to accept the undertaking and recommend the removal of the motion to disallow. The statistics relating to this practice are at paragraph 2.11. The Committee reports to the Parliament recommending the disallowance of the delegated legislation or clause/s in the delegated legislation when required.

2.6 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 6.6 (a), which provides that the Committee is to inquire into whether an instrument '*is within power'* of the empowering enactment.

Undertakings to amend delegated legislation

2.7 The Committee posts two lists of undertakings on its website, namely:

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

2.8 These lists inform stakeholders of issues the Committee has raised and assist officers in drafting delegated legislation. In particular, the Local Government Undertakings list 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.

2.9 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.

2.10 The Committee monitors if delegated legislation has been amended within time in accordance with the undertaking provided.

2.11 Two departmental and 12 local government undertakings were provided to the Committee.[4]

3 COMMITTEE REPORTS

3.1 In 2013 the Committee presented the following eight reports to the Legislative Assembly and the Legislative Council:[5]

- Report 63 – *Information Report in relation to: Children's Court (Fees) Amendment Regulations (No. 2) 2012, Civil Judgments Enforcement Amendment Regulations 2012, Coroners Amendment Regulations 2012, District Court (Fees) Amendment Regulations (No. 3) 2012, Evidence (Video and Audio Links Fees and Expenses) Amendment Regulations (No. 2) 2012, Magistrates Court (Fees) Amendment Regulations (No. 3) 2012, State Administrative Tribunal Amendment Regulations (No. 3) 2012* and *Supreme Court (Fees) Amendment Regulations (No. 3) 2012*, tabled on 19 September 2013.

[4] As at 29 November 2013.

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

- Report 64 – *Town of Victoria Park Parking and Parking Facilities Amendment Local Law 2013*, tabled on 19 September 2013.

- Report 65 – *Explanatory Report in relation to: Legal Profession Conduct Amendment Rules 2013*, tabled on 24 October 2013.

- Report 66 – *Supreme Court Amendment Rules 2013*, tabled on 24 October 2013.

- Report 67 – *Information Report in relation to: City of Fremantle Plastic Bag Reduction Local Law 2012*, tabled on 24 October 2013.

- Report 68 – *Explanatory Report in relation to: Firearms Amendment Regulations (No.2) 2013*, tabled on 31 October 2013.

- Report 69 – *Report seeking clarification of the application of Standing Orders to the Joint Standing Committee on Delegated Legislation*, tabled on 31 October 2013.

- Report 70 – *Annual Report 2013*, tabled on 5 December 2013.

4 EXPLANATORY MEMORANDA

Preparation

4.1 The Committee encountered instances where, in following up agencies who had not submitted an explanatory memorandum to the Committee within the required timeframe, agency staff:

- were either not aware of the requirement to prepare such a document; or

- were not sufficiently aware of the requirements governing their preparation as outlined in the *Premier's Circular Subsidiary Legislation – Explanatory Memoranda 2007/14* for government departments and the *Local Laws Explanatory Memoranda Directions 04-2010 No.3* for local governments.

4.2 While there may be varying reasons for this occurring, one was that the relevant staff were new to the role and had not been made aware of the Committee's requirements.

4.3 The Committee therefore requests that agencies ensure that all staff tasked with the preparation of delegated legislation subject to scrutiny by the Committee are fully briefed on the Committee's requirements, including those new to their role. The Executive, having been delegated the legislative power by the Parliament to make subsidiary legislation, owes the Parliament a duty of full disclosure and due diligence in the preparation of explanatory memoranda.

Standard

4.4 While the majority of explanatory memoranda were of a sufficiently high standard to enable the Committee to perform its scrutiny function, there were a number which did not meet this standard.

4.5 In Report 65 the Committee took the opportunity to specifically highlight the deficiency of an explanatory memorandum submitted by the Legal Practice Board regarding amendments to the *Legal Profession Conduct Amendment Rules 2013* (**Amendment Rules**).

4.6 The Legislative Council discharged the *Notice of Motion* to disallow the Amendment Rules on the motion of the Committee. However, the Committee drew the inadequacy of the explanatory memorandum to the attention of the Parliament. The explanatory memorandum failed to explain, to the Committee's satisfaction, the rationale behind the making of some of the Amendment Rules.

5 PREMIER'S CIRCULAR

5.1 *Premier's Circular 2007/14: Subsidiary Legislation – Explanatory Memoranda* sets out for government departments and agencies the information they are required to provide to the Committee to enable it to fulfil its scrutiny role.

5.2 The Circular is overdue for review. In June 2013, following the State Election, the Director General of the Department of Premier and Cabinet wrote to the Committee seeking the Committee's advice regarding any amendments it required to the Premier's Circular.

5.3 The Committee took the opportunity to recommend an amended form of Premier's Circular. These included the requirement in explanatory memoranda for a 'percentage of cost recovery achieved' column and requiring the agency to identify whether there is any cross-subsidisation between fees and charges.

6 ISSUES RELATING TO REGULATIONS

Supreme Court Amendment Rules 2013

6.1 The Committee formed the view that the *Supreme Court Amendment Rules 2013* (**Amendment Rules**) were not 'within power' of the *Supreme Court Act 1935* and contained matter that was inappropriate for subsidiary legislation. The Committee took issue with the requirement in the Amendment Rules for "*adequate reasons*" to be given for a challenged administrative decision when a person makes an application for judicial review of that decision. This is because there is no general rule of the common law, or principle of natural justice, that requires reasons (adequate or otherwise) to be given for administrative decisions.

6.2 The Committee formed the view that the Amendment Rules would, if allowed, change the common law by subsidiary means. Any change to the common law begins with a policy decision of Executive Government and is ultimately debated in a bill before the Parliament. It is not within the remit of the Judiciary to change the common law by subsidiary means.

6.3 The Committee was not persuaded by the argument of the Honourable Chief Justice of Western Australia that the Amendment Rules constituted mere matters of practice or procedure. The Committee formed the view that the boundaries of permissible rule-making had been exceeded and there was an intrusion into rule-making with respect to substantive rights of parties.

6.4 The Parliament disallowed the Amendment Rules on 29 October 2013.

Disabled Parking Regulations

6.5 The Committee noted an inconsistency in the setting of modified penalties for parking in disabled permit bays by local governments and the *Local Government (Parking for Disabled Persons) Regulations 1988*. The Department of Local Government first alerted the Committee to this issue in the *Town of Claremont Parking Local Law 2012.*

6.6 The modified penalties in the *Local Government (Parking for Disabled Persons) Regulations 1988* have not been amended for nine years and are out-dated. However, until those regulations are amended, an inconsistency exists. Pursuant to section 3.7 of the *Local Government Act 1995*, this makes those local governments' modified penalties inoperative.

6.7 The Minister for Local Government advised that the modified penalties in the *Local Government (Parking for Disabled Persons) Regulations 1988* would be reviewed by the end of 2013.

Fair Trading (Retirement Villages Interim Code) Regulations 2012

6.8 The Committee first noted an issue with clause 5.8 of the Interim Code in December 2012. That clause concerns the repair and refurbishment of residential premises when a resident permanently vacates the residential premises and is required under the residence contract to pay for the cost of any repair or refurbishment of those premises.

6.9 The Committee was concerned at the absence of opportunity in clause 5.8 for vulnerable, elderly residents or their legal personal representatives to query or negotiate that:

- the repair or refurbishment work is needed to be done in the first place; or

- the estimate for the repair or refurbishment work is excessive.

6.10 The only right provided was for the resident or the legal personal representative to take the matter to State Administrative Tribunal, after the event. The Committee took the view that clause 5.8 ousted the rules of fairness.

6.11 The Committee appreciated that clause 5.8 (and indeed the entire Interim Code) had been under review for over three years. For this reason, the Committee did not request an undertaking to amend the clause to make it procedurally fair at that time. However, the Minister, in correspondence during this reporting period, advised that progress had been made towards finalising the Interim Code, which incorporated amendments resulting from the Committee's concern regarding clause 5.8.

7 ISSUES RELATING TO LOCAL LAWS

Section 3.12 of the *Local Government Act 1995*

7.1 In its *Annual Report 2012*, the Committee drew attention to the significant number of instruments it had recommended be disallowed due to non-compliance with section 3.12 of the *Local Government Act 1995* (**Act**), which contains the statutory procedure for the making of a local law. It also recommended in Reports 48 and 51 that section 3.12 is amended "*to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of a local law*."[6]

7.2 The *Town of Victoria Park Parking and Parking Facilities Amendment Local Law 2013*, which the Committee recommended the disallowance of in Report 64, represents yet another example of a local government failing to comply with section 3.12 of the Act, making the need for the amendment of this section all the more compelling.

7.3 The Parliament disallowed the *Town of Victoria Park Parking and Parking Facilities Amendment Local Law 2013* on 19 November 2013.

Non-compliance with an undertaking given to the Committee

7.4 The Committee takes the undertakings given by local governments very seriously, observing that it is rare for a local government to renege on an undertaking. However, this occurred with the *Shire of Kellerberrin Parking and Parking Facilities Local Law 2012* when it gave an undertaking to repeal a clause

[6] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 48, *Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012; Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 51, *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012.

that deviated from a Western Australian Local Government Association (**WALGA**) Model and which the Committee considered to be unreasonable.

7.5 The undertaking had been given to the former Committee but by the time the Committee returned after the State Election, the local government had altered its position and refused to abide by its prior undertaking. Consequently, the Committee resolved to ask the Minister for Local Government to give consideration to requesting the Governor to amend or repeal the text of the offending clause. The Minister agreed and after further negotiation the Minister said he would advise the Governor to make a local law repealing the local government's local law entirely.

7.6 The Committee pressed this course of action out of concern that local governments understand the importance of complying with requests for undertakings from the Parliament and by extension, its committees. This reflects the status of local governments as delegates of the Parliament in making subsidiary legislation and the responsibility they owe the Parliament to fully account for their actions.

Assistance Animals

7.7 Many local laws contain clauses that provide an exemption for guide dogs and hearing dogs to the general ban on animals being on certain local government property, such as public swimming pools and cemeteries. This is in line with the requirements of the *Equal Opportunity Act 1984*.

7.8 During the reporting period the Committee developed a new position regarding this exemption to bring the requirements into line with Commonwealth anti-discrimination legislation as set out in the *Disability Discrimination Act 1992 (Cth).*

7.9 Section 23 of the Commonwealth statute provides that it is unlawful to discriminate against a person on the grounds of their disability by refusing them access to public premises. Section 8(1) then confirms that this also applies if the discrimination against the person occurs because that person has a carer, an assistant, an assistance animal or a disability aid.

7.10 The reference in the Commonwealth statute to the broader term "*assistance animal*" (rather than "*hearing or guide dog*") means that there is potential for local laws to be inconsistent with the Commonwealth legislation and therefore invalid to the extent of that inconsistency.

7.11 This issue arose in a number of local laws during the reporting period. The Committee negotiated with the Minister for Local Government to request the Governor to make global amendments to these problematic clauses in all local

laws. The Committee received a letter from the Minister in August 2013 advising that, after further deliberation, he had decided that the Committee's proposed action was the most effective way to deal with these systemic issues.

7.12 The Minister estimated that the global amendment would be drafted and implemented within a six month timeframe.

Plastic bags

7.13 The *City of Fremantle Plastic Bag Reduction Local Law 2012* was the first of its kind introduced by a local government in Western Australia, and possibly Australia, regarding the regulation of the use of plastic bags. Its scrutiny by the Committee required it to consider whether the subject matter of this local law could be encompassed within the already broad range of matters on which local governments in Western Australia can make local laws pursuant to the *Local Government Act 1995*.

7.14 The local law sought to reduce the use of plastic shopping bags within the City by:

- prohibiting retailers from providing "*single use plastic bags*"; and
- requiring retailers to charge a minimum fee of 10 cents for each "*alternative shopping bag*" provided to customers and retain the fee (provided for in clause 6).

7.15 The City of Fremantle sought to justify the local law on the basis of waste reduction as well as to modify consumer behaviour for this purpose.

7.16 In its Report 67, the Committee:

- expressed the view that the local law was, with exception of clause 6, within power of the *Local Government Act 1995*, under the Committee's Terms of Reference 6.6(a);
- recognised there are a range of views whether:
    a) clause 6 of the local law was within power of the *Local Government Act 1995*; and
    b) under the Committee's Terms of Reference 6.6(b) and (d), the Local Law:
        i) had no unintended effect on any person's existing rights or interests;

ii) contained only matter that is appropriate for subsidiary legislation,

and set out these views, consistent with its Term of Reference 6.4(b), for the information of the Legislative Council in its consideration of the *Notice of Motion* tabled by the Committee to disallow the local law.

7.17 The Parliament disallowed the *City of Fremantle Plastic Bag Reduction Local Law 2012* on 29 October 2013.[7]

7.18 This was the first report of the Committee which utilised new Term of Reference 6.4(b) to enable the expression of a range of views on issues raised by an instrument to assist the Parliament in its consideration of a *Notice of Motion* to recommend disallowance tabled by the Committee.

Discretionary power of swimming pool managers and attendants

7.19 In its *Annual Report 2012*, the former Committee reported that it had come across two local laws purporting to give swimming pool managers and attendants a discretionary power to admit persons to a pool area when the WALGA *pro forma* does not permit this to occur. The Committee noted another local government's local law contained the same error in this reporting period.

7.20 Pool entry is not covered in the *Health (Aquatic Facilities) Regulations 2007* but notably, the clause appeared to 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*.[8] It states (Committee emphasis):

> *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.*

7.21 Under the Code, a Manager or Attendant lacks discretionary power to admit persons to a facility which would include the pool area. The Committee's view was

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7 Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 October 2013, p32.

8 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.*

that a clause in the local government's local law was inconsistent with a Code which has been incorporated into the *Health (Aquatic Facilities) Regulations 2007*.

7.22 Another clause gave a Manager or Attendant a discretion to admit or not admit a person who is "*apparently suffering from a contagious, infectious or cutaneous disease or skin complaint*" but this is inconsistent with regulation 24 of the *Health (Aquatic Facilities) Regulations 2007* which states (Committee emphasis):

> *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*
> >
> > *(d) under the apparent influence of alcohol, drugs or alcohol and drugs; or…*

7.23 'Water body' in the *Health (Aquatic Facilities) Regulations 2007* 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). The local government provided an undertaking to delete the discretion.

8 FEES AND CHARGES

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

Committee approach

8.2 The Committee uses the approach in the *Annual Report 2012* to scrutinise fees.[9] It has successfully liaised with various agencies to ensure that appropriate costing

[9] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 61, *Annual Report 2012*, 15 November 2012, pp8-9.

methodologies are in place that provide evidence that fees and charges are at or below cost recovery.

8.3 The Committee takes this opportunity to remind agencies to ensure that all explanatory memoranda submitted to the Committee for instruments that seek to increase fees and charges include:

- a cost recovery percentage in a 'cost recovery percentage' column in the fee table;
- a detailed description of the costing systems/methodologies; and
- all other information as required in the Premier's Circular.

8.4 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.

Court fees

8.5 In its Report 63 the Committee scrutinised eight instruments seeking to increase court and related fees by the Consumer Price Index. These instruments were similar to those scrutinized by the Committee the subject of its Report 32[10] and those referred to in the *Annual Report 2012*.

8.6 It was unable to properly perform its scrutiny of these instruments due to the inadequate level of financial information given by the Department of the Attorney General to justify the increase in fees, including the lack of a costing methodology that can be used to cost individual fees.

8.7 To enable the Committee to properly perform its scrutiny function, it must receive enough information to demonstrate to the Committee's satisfaction that each fee is at or below cost recovery. This information is especially vital when the empowering legislation does not authorise any of the fees covered by the eight instruments to be a tax.

8.8 While the Committee decided not to recommend disallowance of the eight instruments, it recommended a costing model be developed by the Department of the Attorney General to demonstrate at or below cost recovery for each fee covered by eight instruments.

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[10] Western Australia, Legislative Council, 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*, 14 May 2009.

8.9 Debate in the Legislative Council on the fees indicates that the Government continues to struggle with costing court fees. The Attorney General said:

> *A lot of work has been done. A trial has been conducted in the District Court and, as Hon Peter Katsambanis pointed out, the ultimate result of that was that it was not a practical thing to do without it costing more than was justified. That money could be far better spent on providing essential court services and being devoted to that exercise, rather than having an army of accountants and computer databases calculating things that have nothing but an academic value at the end of the day.*[11]

8.10 On 20 November 2013 the Government's response to Report 63 was tabled in the Legislative Council. A copy of this response is attached as **Appendix 1**.

8.11 The response demonstrates there remains a significant divergence of views between what the Government and the Committee regards as sufficient evidence to demonstrate at or below cost recovery, which has not fundamentally changed since the tabling of Report 32.

8.12 The Committee is of the view that it is only the furnishing of evidence to demonstrate that each individual fee is at or below cost recovery that provides assurance that each of these individual fees is not an unauthorised tax. Had the District Court pilot project referred to in Report 63 been successfully implemented, this may have enabled this outcome.

9 LOCAL LAWS WORKING GROUP

9.1 This group comprises representatives from the Office of the Minister for Local Government, Department of Local Government, Local Government Managers' Association (Western Australia), WALGA, Department of Health, the Department of Environment and Conservation and Committee members and staff. It provides an opportunity for participants to discuss local law issues of concern including issues commented on in this report.

9.2 The group last met on 13 March 2012. Due to the shorter sitting period for 2013 a meeting did not take place this year.

9.3 The Committee is in contact with the Department of Local Government with a view to arranging a meeting in early 2014.

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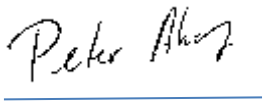
[11] Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 October 2013, p4910.

10 CONCLUSION

10.1 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.

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



Mr Peter Abetz MLA
Chairman
5 December 2013

APPENDIX 1

GOVERNMENT RESPONSE TO REPORT 63 TABLED 20 NOVEMBER 2013

ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-07937

Mr Peter Abetz MLA
Chair
Joint Standing Committee on Delegated Legislation
GPO Box A11
PERTH WA 6837

Dear Mr Abetz

GOVERNMENT RESPONSE TO REPORT 63

I refer to the tabling of the above Report on 19 September 2013. The following comprises the Government response to the Report in accordance with Standing Order 191(1).

The Report contained two recommendations:

Recommendation 1
The Committee recommends that the Department of the Attorney General develop a costing model for court fees that demonstrates at or below cost recovery for each individual fee and report to the Legislative Council on its progress by 31 March 2014.

Recommendation 2
The Committee recommends that the notices of motion previously placed against the following instruments:

- Children's Court (Fees) Amendment Regulations (No. 2) 2012;
- Civil Judgments Enforcement Amendment Regulations 2012;
- Coroners Amendment Regulations 2012;
- District Court (Fees) Amendment Regulations (No. 3) 2012;
- Evidence (Video and Audio Links Fees and Expenses) Amendment Regulations (No. 2) 2012;
- Magistrates Court (Fees) Amendment Regulations (No. 3) 2012;
- State Administrative Tribunal Amendment Regulations (No. 3) 2012; and
- Supreme Court (Fees) Amendment Regulations (No. 3) 2012,

be discharged from the notice paper.

With regard to Recommendation 1, the Department of the Attorney General has an existing costing model for court fees, which is consistent with the Government's current policy on fee setting and the associated cost of services, largely contained in the *"Costing and Pricing Government Services: Guidelines for use by Agencies in the Western Australian Public Sector"*, 5th edition April 2007, published by the Department of Treasury.

Furthermore, legal advice from the State Solicitor's Office that was provided to the Joint Standing Committee is clear that:

> *...it is sufficient if the fee imposed under each relevant Act as a whole reflect a reasonable estimation of the cost of the operations of the relevant court or tribunal under the Act, and there is a rational basis for the division of those estimated costs between the different kinds of fee. ...it is not necessary that the revenue for particular fees be matched to the exercise of the particular functions to which those fees relate.*

The appropriate approach for determining fees, as outlined in the guidelines, is for a fee to be set on the basis that gives a reasonable expectation that cost recovery will not be exceeded. The Department's agreed and applied principle is to maintain the existing level of recovery when a fee is to be increased.

The Department arrived at this principle by:

- Examining existing fee structures within all jurisdictions to ensure compliance to the guidelines;
- Basing the cost of service calculations (for groups of services or where possible individual services) on the most recently completed financial year data;
- Estimating current year and future year revenues from expected court fees;
- Calculating cost recovery associated with major costing groups by jurisdiction and where possible for individual fees; and
- Comparing this to the previous year.

Furthermore, the Department has conducted a pilot project, to establish a fee by fee cost setting process for the District Court. This project was abandoned because it was difficult to verify the assumptions that needed to be made to cost on a fee by fee basis and to further develop the model would have been prohibitively expensive.

Consequently, I do not support Recommendation 1 on the basis that:

- The methodology used by the Department of the Attorney General to allocate and determine the costs associated with the fees in the eight instruments is consistent with the State Government's Costing and Pricing Guidelines.

- Legal advice from the State Solicitor's Office indicates that:

    - the fees contained in the amendment regulations are legally valid and that the practice of assessing cost recovery at a higher level than a fee for fee basis is appropriate;
    - it is not necessary that the revenue for particular fees be matched to the exercise of the particular functions to which those fees relate; and
    - cost recovery rates in most areas for court fees are only 20-30% and are quite clearly not over recovering costs.

In relation to Recommendation 2, the Government notes that the Committee discharged the notices of motion.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

19 NOV 2013