THIRTY-NINTH PARLIAMENT

REPORT 78

JOINT STANDING COMMITTEE ON

DELEGATED LEGISLATION

ANNUAL REPORT 2014

Presented by Mr Peter Abetz MLA (Chairman)

&

Hon Robin Chapple MLC (Deputy Chair)

January 2015

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:

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

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

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

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

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

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

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

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

(a) is within power;

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

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

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

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

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

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

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

10.8 In this order –

"instrument" means –

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

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

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

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chairman)
Hon Robin Chapple MLC (Deputy Chair)
Hon John Castrilli MLA
Hon Peter Katsambanis MLC
Hon Mark Lewis MLC
Ms Simone McGurk MLA
Mr Paul Papalia MLA
Hon Ljiljanna Ravlich MLC

Staff as at the time of this inquiry:

Samantha Parsons (Committee Clerk)
Kimberley Ould (Advisory Officer (Legal))
Anne Turner (Advisory Officer (Legal))
Suzanne Veletta (Advisory Officer (Legal))

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au
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EXECUTIVE SUMMARY

1 This Annual Report 2014 outlines the activities of the Joint Standing Committee on Delegated Legislation (**Committee**) and comments on significant issues arising from the Committee's scrutiny of delegated legislation during 2014.

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

3 The Committee continues to scrutinise a large number of Instruments of delegated legislation. Between 1 January and 31 December 2014, the Committee was referred 421 gazetted instruments including 270 regulations and 69 local laws.

4 The Committee extends its appreciation to those Ministers, contact persons in departments and local governments who provided assistance to the Committee.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

ANNUAL REPORT 2014

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1 INTRODUCTION

Overview

1.1 This Annual Report 2014 outlines the activities of the Joint Standing Committee on Delegated Legislation (**Committee**) in 2014 and comments on significant issues arising from the Committee's scrutiny of delegated legislation.

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

1.3 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.

1.4 The majority of the instruments of delegated legislation considered are regulations made by the Executive Government via the Governor in Executive Council. Other instruments include local laws made by the 140 local governments as well as instruments made by statutory bodies and boards.

Committee Members

1.5 In 2014 the Committee was constituted by Members noted on the inside cover of this Report. Mr Peter Watson MLA served as a Member until 18 February 2014. Mr Paul Papalia MLA was appointed on 20 February 2014.

Terms of Reference

1.6 The Committee's *Terms of Reference* are listed 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 any proposed or existing template, pro forma or model local law

1.7 During this reporting period the Committee activated for the first time, Term of Reference 10.7(a).[1] That Term of Reference allows the Committee to report the Committee's views on any proposed legislation. The Committee tabled Report 77 *Inquiry into a Proposed Template Waste Local Law* regarding the Western Australian Local Government Association's proposed template Waste Local Law.

1.8 The proposed template had its genesis in Report 46, *City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011,* disallowed by the Parliament in late 2011 because of their highly prescriptive clauses governing private waste containers and penalties attached to their improper use or maintenance. The clauses also criminalised activities by otherwise law abiding citizens.

Reporting to Parliament on any systemic issue identified in 2 or more instruments of subsidiary legislation

1.9 Term of Reference 10.7(b) was activated twice during this reporting period. The first was Report 74 – *Inquiry into Access to Australian Standards Adopted in Delegated Legislation - Terms of Reference.* That Report advised the Parliament of a systemic issue relating to difficulties accessing Australian Standards adopted in delegated legislation. The Committee has programmed that Inquiry for 2015.

1.10 The second was Report 75 - *Identifying a Systemic Issue Arising out of Nine Court and Tribunal Instruments.* That Report advised the Parliament of the Committee's views on court and tribunal fee increases.

2 COMMITTEE ACTIVITIES

2.1 The Committee held 20 meetings in 2014.[2] A breakdown of activities in 2014, noting instruments gazetted up until 31 December 2014 is as follows.

Disallowable instruments referred	421
Regulations referred	270
By-laws (all by-laws were made by the Executive)	16
Local laws made by local government	69
Rules referred	17
Other instruments referred (including Region Planning Schemes, orders, notices and plans)	49
Notices of motion for disallowance given	26
Notices of motion for disallowance withdrawn	23

[1] It states: *10.7: It is also a function of the Committee to inquire into and report on – (a) any proposed or existing template, pro forma or model local law.*

[2] The first meeting was held on 19 February 2014 and the last on 2 December 2014.

Hearings held by the Committee	3
Instruments where undertakings were provided to the Committee to amend the instrument	12
Reports tabled in 2014	7
Disallowance reports tabled in 2014	2
Instruments disallowed on recommendation of the Committee	2

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 a *Notice of Motion* to recommend disallowance must be tabled within 14 sitting days of the instrument being tabled in the Parliament. The vast majority of these *Notices of Motion* are either withdrawn or discharged from the Notice Paper following receipt of satisfactory responses from Ministers and councils of local governments.

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* 10.6(a). This 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 with which the Committee has taken issue.

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 Twice a year, the Committee monitors if delegated legislation has been amended within the requested timeframe. In this reporting period, 10 departmental and 11 local government undertakings were provided.

Sessional Resolution Number 14

2.11 Sessional resolutions are internal work practices adopted by parliamentary committees. The Committee does not usually publish such resolutions but resolved to publish *Sessional Resolution Number 14* to advise the range of final decisions at the Committee's disposal in relation to Instruments. *Sessional Resolution Number 14* states:

> ***Authority to disclose final decisions***
>
> *Unless otherwise ordered by the Committee, Committee members and staff are authorised to advise any department, entity or person of any final decision made by the Committee in relation to an instrument considered by the Committee, including the decision to:*
>
> - *take no further action;*
> - *table a Notice of Motion to disallow the instrument in the Legislative Council;*
> - *withdraw a Notice of Motion to disallow the instrument in the Legislative Council;*
> - *rescind a resolution to disallow the instrument; or*
> - *prepare a report for tabling in the Legislative Council and the Legislative Assembly.*

3 COMMITTEE REPORTS

3.1 In 2014 the Committee presented the following seven reports to the Legislative Assembly and the Legislative Council:[3]

- Report 71 – *Inquiry into a Systemic Issue arising out of Nine Court and Tribunal Instruments - Terms of Reference*, tabled on 10 April 2014.
- Report 72 – *Shire of Shark Bay Local Government Property Amendment Local Law 2014*, tabled on 21 August 2014.
- Report 73 – *Inquiry into Proposed Template Waste Local Law - Terms of Reference*, tabled on 11 September 2014.
- Report 74 – *Inquiry into Access to Australian Standards Adopted in Delegated Legislation - Terms of Reference*, tabled on 11 September 2014.
- Report 75 – *Identifying a Systemic Issue Arising out of Nine Court and Tribunal Instruments*, tabled on 18 September 2014.
- Report 76 - *City of Greater Geraldton Animals, Environment and Nuisance Local Law 2014* on 20 November 2014.
- Report 77 – *Inquiry into a Proposed Template Waste Local Law*, tabled on 27 November 2014.

4 EXPLANATORY MEMORANDA

Preparation

4.1 Departments, statutory authorities and local governments submit explanatory memoranda via either electronic lodgement or soft copy.

4.2 The Committee continues to encounter instances where, in following up those who had not submitted an explanatory memorandum to the Committee within the required timeframe, 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 2014/01* for government departments and the *Local Laws Explanatory Memoranda Directions 04-2010 No.3* for local governments.

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

4.3 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 Committee requirements.

4.4 The Committee therefore expects Departments, statutory authorities and local governments to 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 of Explanatory Memoranda

4.5 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.

Standard of responses to requests for explanations

4.6 The Committee acknowledges the high quality standard of work provided by the:

- Minister for Mines and Petroleum in May 2014 regarding various Petroleum and Geothermal Energy Fee Adjustments[4]; and
- Minister for Environment in March 2014 regarding the *Environmental Protection (Noise) Amendment Regulations 2013*.

Region Planning Schemes – Statutory Procedure Checklist

4.7 One function of the Committee is to scrutinise Region Planning Schemes and their amendments (**RPS**). An RPS is subject to disallowance under section 56(2) of the *Planning and Development Act 2005*. That Act contains a number of procedural requirements for making an RPS. The Committee considers, under its *Term of Reference* 10.6(a), that if these procedural requirements are completed, the RPS is valid.

4.8 Hon John Day MLA, Minister for Planning, agreed to provide a Statutory Procedures Checklist in the existing Explanatory Memorandum provided for each RPS.[5] This information will enable the Committee to appropriately fulfil its scrutiny function.

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[4] These were the *Petroleum and Geothermal Energy Resources Amendment Regulations 2014*; *Petroleum and Geothermal Energy Resources (Registration Fees) Amendment Regulations 2014*; *Petroleum Pipelines Amendment Regulations 2014*; *Petroleum (Submerged Lands) Amendment Regulations 2014*; and *Petroleum (Submerged Lands) Registration Fees Amendment Regulations 2014*.

[5] Letter from Hon John Day MLA, Minister for Planning, 25 November 2014.

5 PREMIER'S CIRCULAR

5.1 *Premier's Circular Subsidiary Legislation – Explanatory Memoranda 2014/01* (**Circular**) 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 was issued on 15 February 2014 and contains many features the Committee had formally requested. During this reporting period, the Circular assisted the Committee to scrutinise departments and agencies' fee increases by requiring in explanatory memoranda, a 'percentage of cost recovery achieved' column and identifying any cross-subsidisation between fees and charges.

5.3 The Committee extends its appreciation to the Attorney General for agreeing to the Committee's enhancements to the Circular.

6 ISSUES RELATING TO REGULATIONS

Disabled Parking Regulations

6.1 In the *Annual Report 2013*, the Committee reported on 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 and Communities had first alerted the Committee to this issue in the *Town of Claremont Parking Local Law 2012*.

6.2 On 10 October 2014, the *Local Government (Parking for People with Disabilities) Regulations 2014* were gazetted which, amongst other things:

- repealed the *Local Government (Parking for Disabled Persons) Regulations 1988*;
- re-named the Instrument with modern disability language and for consistency with the language of the *Road Traffic Code 2000*; and
- increased the modified penalty for standing or parking in a disabled bay (now called a 'permit parking area') to $300.

6.3 The Committee extends it appreciation to the Minister for Local Government and Communities for finalising this matter.

Fair Trading (Retirement Villages Interim Code) Regulations 2014

6.4 The Committee first noted an issue with clause 5.8 of the Interim Code in December 2012. That clause concerned the repair and refurbishment of residential premises when a resident permanently vacated the residential premises and was required

under the residence contract to pay for the cost of any repair or refurbishment of those premises.

6.5 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 was needed to be done in the first place; or
- the estimate for the repair or refurbishment work was excessive.

6.6 The only appeal right provided was for the resident or their legal personal representative to take the matter to the State Administrative Tribunal, after the event. Over the past two years, the Committee took the view that clause 5.8 ousted the rules of procedural fairness.[6]

6.7 The Interim Code including clause 5.8 has been under review for over four years. For this reason, the Committee has not requested an undertaking to amend the clause to make it procedurally fair. In this reporting period, the Committee has scrutinised the same Interim Code twice with a new, replacement Code now expected by March 2015.

7 ISSUES RELATING TO LOCAL LAWS

Section 3.12 of the *Local Government Act 1995*

7.1 Annual Reports from 2011, 2012 and 2013 highlighted the continuing problem of local governments' non-compliance with the mandatory, sequential procedure for making a local law prescribed in section 3.12 of the *Local Government Act 1995*. In this reporting period, the same error arose in the *Shire of Shark Bay Local Government Property Amendment Local Law 2014*. The Legislative Council disallowed the Instrument on the Committee's recommendation.

7.2 The Department for Local Government and Communities advised on 27 October 2014 that the Minister is progressing an amendment to section 3.12 of the *Local Government Act 1995* to overcome the issue of some local governments' non-compliance with the procedure.[7] The proposed amendment is as follows.

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[6] These are freedom from bias either actual or apparent in decisions made by an interested decision-maker. The right to be heard. The right to be given reasons for a decision affecting rights or property.

[7] At the 2014 Local Laws Working Group meeting, departmental officers advised that the Department had reviewed similar legislation in other Australian jurisdictions and found the procedures in Western Australia to be more prescriptive.

*4. **Section 3.12 amended***

After section 3.12(1) insert:

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

7.3 The proposed amendment has its genesis in the Committee's *Annual Report 2011*, where it was noted that local governments on a number of occasions had substantially, but not strictly, complied with section 3.12 procedures. Of them, the Committee said:

> *Their non-compliance with the prescribed procedures, often due to a simple administrative error or unclear instructions, could be best described as a technical non-compliance which does not, in the Committee's view, impact on the integrity of the local law in question. In some cases it is clear to the Committee that no harm or adverse impact is caused if the timing of procedures set out in section 3.12 is not complied with by a number of days.*
>
> *For example, in considering the Town of Kwinana Extractive Industries Local Law 2011 the Committee was put in the position where it considered that it had no choice but to recommend the disallowance of the law even though the procedures set out in section 3.12 of the LG Act had substantially been complied with and no harm was caused by the local government's error…*
>
> *When the Committee considered the substance of the local law, it found no problematic clauses but due to the invalidly issue was forced to recommend disallowance of the instrument.*
>
> *The Committee considers that recommending disallowance of a local law in these circumstances unnecessarily impacts on Committee, Parliament and local government time and resources.*[8]

7.4 The Committee supports the proposed amendment.

Fencing Local Laws

7.5 The Committee queried the Attorney General about the legal uncertainty as to whether fencing local laws are to be made under section 5 of the *Dividing Fences Act 1961* or

[8] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 49, *Annual Report 2011*, 3 May 2012, pp9-10.

just section 3.5(1) of the *Local Government Act 1995*. This is important because a local law is invalid if the law is made under the *Dividing Fences Act 1961* and the local government fails to provide a copy of the proposed local law; Statewide notice of it; and later a copy of the gazetted local law, to the Minister for Commerce as required under section 3.12 of the *Local Government Act 1995*.

7.6 The Attorney General supported the Committee's view that the *Local Government Act 1995* is the source of power and not the *Dividing Fences Act 1961*. The Attorney General's letter explaining the rationale is attached at **Appendix 1**.

7.7 The Committee now considers this matter settled. In future, local governments need only cite the *Local Government Act 1995* in the title and enacting clause when drafting a fencing local law.

Cat local laws

7.8 The Committee drove legislative reform of cat law after encountering numerous problems with cat local laws made under the *Local Government Act 1995*.[9] Consequently, the *Cat Act 2011* was enacted and in 2013, the *Cat (Uniform Local Provisions) Regulations 2013* were gazetted.[10]

7.9 Section 27(a) of the *Cat Act 2011* empowers an authorised person in any public place, to seize any cat that the authorised person believes or suspects on reasonable grounds is the subject of an offence against the Act. In other words, a cat that the authorised person believes or suspects to be unsterilised, unregistered, not wearing a registration tag or not microchipped.

7.10 In this reporting period, the Committee scrutinised Part 2 of the Shire of Dardanup *Keeping and Control of Cats Local Law 2014*.[11] Part 2 provides that cats must not be in a "public place" or other place unless under "effective control" meaning any of the following methods:

> *(a) held by a person who is capable of controlling the cat;*

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9 The Committee had formed a view that the *Local Government Act 1995* did not provide the legislative basis for a local law to contain provisions requiring the sterilisation of cats; and that, in any case, a local law was not the appropriate legislative instrument for this purpose and had historically disallowed attempts by local governments to introduce local laws on the basis that cat control needed to be dealt with on a state-wide basis. See the Committee's Report 34, 10 September 2009, *City of Joondalup Cats Local Law 2008.*

10 During the Parliamentary debate in 2011, concerns were raised about the impact the Act would have on the number of cats that cat fanciers and breeders could own if local governments introduced a local law limiting cat numbers. Not all local governments have cat laws and there is no WALGA model. However, those that do, restrict cat numbers to 3. The former Minister for Local Government gave an undertaking that regulations would be introduced to ensure that if a local government introduced a local law limiting numbers, they would be reasonably protected.

11 That local law was based on the *Shire of Busselton Keeping and Control of Cats Local 2014.*

(b) securely tethered;

(c) secured in a cage; or

(d) any other means of preventing escape.

7.11 A public place "*includes any place to which the public may lawfully have access*".

7.12 The effect of Dardanup's law is that it is an offence[12] to have your cat in a public place, including your own verge, or on the road on a quiet street, without the cat being, in the opinion of an authorised person, under 'effective control'. Similarly, it is an offence to allow your cat to be in any "other place" unless consent is given by the occupier or on behalf of the occupier and it is under 'effective control'. For example, a cat must under effective control at a neighbour's house even if the neighbour gives consent. Cats in public or other places may be seized and impounded by an authorised person.

7.13 The Department of Local Government and Communities made a number of comments in relation to Dardanup's Local Law. In particular, that while section 79(3) of the *Cat Act*[13] provides that local governments can create cat local laws regarding certain subjects, including prohibiting cats from certain areas, it is uncertain whether this extends to allowing cats in public areas subject to restrictions.

7.14 Section 27(a) is the only provision of the Act dealing specifically with cats on public land. Section 27(b)(i) of the Act empowers an authorised person, in any premises lawfully entered, to seize ***any cat*** at the request, or with the consent, of the person who is, or appears to be, the owner or occupier of the premises. This section does not require that the authorised person believe or suspect that the cat is the subject of an offence under the Act. The cat may be registered and tagged and may still be validly seized under this section.

7.15 The general law-making power in the *Local Government Act 1995* cannot authorise local laws that are repugnant with another Act, in this case the *Cat Act 2011*.[14] The Act 'covers the field' on the regulation of cats in public places and other places. It provides that certain cats, namely those believed or suspected by an authorised person to be unsterilised, unregistered, not wearing a registration tag or not microchipped, may be seized. By implication, all other cats can lawfully remain on public land.

7.16 The effect of Dardanup's clauses 2.1 and 2.2 when read together is to require that unless under "effective control", cats must be confined to the premises in which they

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12 (with a $250 infringement notice penalty or maximum of $5,000 if prosecuted in court)

13 Section 79(3)(f) states that a local law may be made "*as to… specifying places where cats are prohibited absolutely*".

14 Section 3.7 of the *Local Government Act 1995*.

are kept. If they are not so confined, their 'keeper" has committed an offence under the Local Law and the cat is subject to seizure under clause 2.1(2) or 2.2(2). Using the language of the High Court in *R v Commissioner of Patents; Ex parte Martin*[15], clause 2.1 'endeavours to take a new step in policy' and is thus repugnant to the Act.

7.17 Further, the local law-making power in section 79(3)(g) of the Act[16] extends only to local laws "*requiring that in specified areas a portion of the premises on which a cat is kept must be enclosed in a manner capable of confining cats*". Although it is true that the general local law-making power under section 79(1) is not limited by the specific powers set out in section 79(3), local laws which are directly contrary to any of the specific powers would be repugnant to the Act. By section 79(3)(g), the Parliament has arguably delineated the scope of valid local laws concerning the confinement of cats. Dardanup, in requiring all cats be confined to their keepers' premises, is taking a significant new policy step. Part 2 of the Local Law in requiring that unless under "effective control", cats must be confined to the premises in which they are kept, is a significant change to existing policy and a fundamental change in the law relating to cats.

7.18 The Committee resolved that Part 2 was inconsistent with or repugnant to the *Cat Act 2011*[17] and therefore not within power.[18] Further, that as Part 2 constituted a significant change to existing policy relating to cats, it was not appropriate for subsidiary legislation.[19] The Committee sought undertakings from the Shire of Dardanup to repeal Part 2 of the Local Law.

7.19 Noting identical provisions in Part 2 of the Shire of Busselton *Keeping and Control of Cats Local Law 2014*, the Committee intends to ask the Minister for Local Government and Communities to request the Governor to repeal the offending clauses pursuant to section 3.17 of the *Local Government Act 1995*. Consequently, the Committee also considered the following operational local laws which deal with the presence of cats in public and other places and contain similar, offending clauses:

- Clause 6 of the *Shire of Donnybrook-Balingup Keeping and Welfare of Cats Local Law 2007*;
- Clause 10.1 of the *Shire of Mundaring Keeping and Control of Cats Local Law 2005*;

15 (1953) 89 CLR 381.

16 It states that a local law may be made "*requiring that in specified areas a portion of the premises on which a cat is kept must be enclosed in a manner capable of confining cats*".

17 Specifically, sections 27 and 79(3).

18 See Committee Term of Reference 10.6(a).

19 See Committee Term of Reference 10.6(d).

- Clause 6 of the *Shire of Capel Local Law relating to the Keeping and Welfare of Cats 2004*; and

- Clause 7(6) of the *Shire of Ashburton Local Law Relating to the Control of Cats 1998*.

7.20 It is the Committee's intention to ask the Minister for Local Government and Communities to request the Governor to also repeal these offending clauses.

Assistance Animals

7.21 In 2013, the Committee reported that many local laws contain exemption clauses for guide dogs and hearing dogs to the general ban on animals being on certain local government property, such as public swimming pools, cemeteries and jetties. This is in line with the requirements of the *Equal Opportunity Act 1984*. However, these local laws were not consistent with Commonwealth anti-discrimination legislation as set out in the *Disability Discrimination Act 1992 (Cth).*

7.22 This issue arose in a number of local laws during this reporting period. The Committee negotiated with the Minister for Local Government to request the Governor to make a global amendment to these problematic clauses in all local laws. To date, the Parliamentary Counsel's Office has reviewed over 300 local laws.

Local Government correspondence

7.23 The Committee continues to experience problems with Mayors and Shire Presidents failing to sign correspondence on behalf of their councils' resolutions. Instead, the Committee receives correspondence signed by chief executive officers, rangers; environmental health or planning officers.

7.24 As the Committee is part of the legislative arm of Government, it needs to communicate with and receive responses from, the legislative arm of local governments, not the executive (administrative) arm unless there are exceptional reasons.[20]

8 FEES AND CHARGES

8.1 The Committee continues to spend a significant amount of its time considering fees and charges imposed by departments, agencies and statutory authorities in delegated legislation.[21] The Committee's task was made easier by the publication of the

[20] An exception was the *City of Fremantle Alfresco Dining Local Law 2014* when the Committee indicated it would accept correspondence from the chief executive officer. That Instrument was exceptional because the Committee did not receive an Explanatory Memorandum in relation to it and although not formally confirmed, the City intends to repeal it.

[21] Local government fees and charges do not appear in the text of local laws.

Premier's Circular Subsidiary Legislation – Explanatory Memoranda 2014/01. However, the Committee had to assist departments, statutory authorities and local governments to comply with the Circular's Fee and Charges Table requirements during this year's annual fee and charge review period. Once agencies understood the new requirements, the information was promptly provided.

Court and tribunal fees

8.2 The Committee held a hearing with the Department of the Attorney General at which officers with financial management experience presented a spreadsheet of how the Department calculates its fees. The presentation facilitated the resolution of a long-standing impasse between the Committee and the Department over the setting of court and tribunal fees since the tabling of Report 32 in May 2009.[22]

8.3 The Committee's findings and recommendations in relation to court and tribunal fees were set out in Report 75.

9 LOCAL LAWS WORKING GROUP

9.1 The Local Laws Working Group (**Working 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 as well as Committee members and staff. The Working Group provides an opportunity for participants to discuss local law issues of concern including issues commented on in this report. The Working Group met on 26 March 2014 after a two year hiatus.

The proposed Public Health Bill

9.2 The Working Group requested the Committee's views on a proposal to remove the local law making power out of current health legislation and for these laws to be made instead, under the *Local Government Act 1995*. A question was posed about whether making laws about public health could come under the 'good governance' provisions of the *Local Government Act 1995*.

9.3 The Committee considered the width of section 3.5[23] read with section 3.1[24] of the *Local Government Act 1995* and whether they could provide the requisite head of

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22 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.

23 Titled the "*legislative power of local .governments*" and allows the making of laws for them to perform any of their functions under the *Local Government Act 1995*.

24 Titled the "*General function of a local government*" and is to provide for the good government of persons in its district.

power for health local laws. Those sections provide a broad, non-specific power under which local governments may make local laws.

9.4 Historically, the Committee has provided commentary in many tabled reports on the width and function of sections 3.1 and 3.5 when it thought the power was being used too widely. This commentary reflected the operation of the sections, specifically, with regard to limitations placed on it within the *Local Government Act 1995* and more generally the status of "good government" provisions in prevailing case law. Listed below is a small selection of scenarios where the Committee considered the sections were applied too widely.

- In 2002, the Committee recommended disallowance of a local law that sought to set up an internal tribunal mechanism, to parallel the function of the criminal courts.[25]

- In 2007, the Committee drew attention to concerns with a subclause of the City of Fremantle Parking Local Law 2006, which provided that a person was not to drive a vehicle in a parking station so as to cause any person present in or near the parking station apprehension of danger or apprehension of damage or injury to any property. The Committee concluded that mere apprehension of danger was too subjective and too vague to form a basis for a legal obligation.[26]

- In 2008, the Committee expressed its view that clauses in health local laws that imposed liability on an employee for a range of occupier duties were unauthorised as they were inconsistent with common law principles of personal responsibility in criminal law.[27]

- In 2009, the Committee observed that the good governance of persons in a district does not authorise imposition of criminal liability in circumstances not contemplated by the Criminal Code or the common law.[28]

- In 2009, a local law authorised the compulsory sterilisation of cats in attempt to widen the scope of the general function. The offending clause went

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25 Joint Standing Committee on Delegated Legislation, Report 4: *City of Perth Code of Conduct Local Law*, 26 September 2002.

26 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 23, *Issues of Concern raised by the Committee between 1 May 2006 and 30 April 2007 with respect to Local Laws*, 7 June 2007. The general formulation of such a prohibition in criminal law is that a person must not cause actual danger; or threaten danger so as to cause a genuine, and reasonably based, apprehension that danger will eventuate.

27 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 26, *Issues Arising under Health Local Laws*, 20 March 2008.

28 Joint Standing Committee on Delegated Legislation, *Report 31: Issues of concern raised by the Committee between 1 May 2007 and 30 April 2009 with respect to local laws*, 14 May 2009, p12.

beyond accepted notions of local government. It imposed a law on a highly controversial and emotive subject which had significant implications beyond the local government's district.[29]

- In 2011 the breadth of 'good governance' provisions in relation to waste local laws was tested.[30] This is discussed at paragraph 1.8.

9.5 The Committee noted a historical lack of judicial exegeses on what constitutes notions of good government since *Lynch v Brisbane City Council* in 1960.[31] However, in 2013, the width of a general by-law making power was referred to in *Attorney-General (SA) v The Corporation of the City of Adelaide* (**Corneloup**).[32] That case concerned two brothers who were subject to a by-law banning street-preaching in Adelaide's Rundle Mall, a city shopping district.

9.6 Chief Justice French referred to the venerable ancestry of the broad power and that the issue of validity turned on applying a "*high threshold test for unreasonableness*" cited in *Slattery v Naylor*[33]as a "*merely fantastic and capricious bye-law, such as reasonable men could not make in good faith*".[34] In Corneloup, the by-law was held to be a valid exercise of the general power.

9.7 As the delegating body, the Parliament has the power to disallow any delegated legislation for a reason unrelated to whether an instrument is "within power" of its empowering enactment. Using Report 34: *City of Joondalup Cats Local Law 2008* as an example, the Parliament could have disallowed the Instrument purely for policy reasons simply because of the statewide character of the local law.

9.8 In the light of Corneloup and the cumulative effect of commentary in some of the tabled reports listed above, the Committee is of the view that its historical approach to sections 3.1 and 3.5:

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29 Joint Standing Committee on Delegated Legislation, *Report 34: City of Joondalup Cats Local Law 2008*, 10 September 2009. Clause 7 imposed requirements on residents to fund and have carried out a surgical procedure which altered the condition of their private property; took effect in relation to cats that may never leave their owner's residence or pose a risk to wildlife; produced an outcome, sterilisation, that is not linked only to the district, but continued to impact on a cat owner for the rest of the cat's life wherever they chose to live should they leave the local government area; and dealt with policy matters of statewide concern and interest which required the consideration of the State Parliament.

30 Joint Standing Committee on Delegated Legislation, *Report 46, City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011*, 24 November 2011.

31 (1961) 104 CLR 353 at 365.

32 [2013] HCA 3.

33 (1888) 13 App Cas 446 in *Courneloup's Case* at 22.

34 The view of Kiefel and Crennan JJ indicated a willingness to actively consider the proportionality of a law when determining its reasonableness where French CJ applied a high threshold for establishing unreasonableness in such a situation, and Hayne J applies a conventional sufficiency of connection test. French CJ engaged in a detailed genealogy of the development of the high threshold test for reasonableness at pp 22-30.

- positively acknowledges its breadth and capacity to cover a wide range of issues peculiar to local government; and

- requires of subject local laws a level of reasonableness with respect to the objects and functions of the local law as delegated legislation (and with regard to the Parliament's intentions when enabling such delegation).

9.9 The Committee is of the view that sections 3.1 and 3.5 of the *Local Government Act 1995* would authorise the making health local laws. However, the public health imperative mandates a degree of Department of Health oversight in the making of health local laws, for example, requiring consent of the Executive Director of Public Health as is currently the practice.

10 CONCLUSION

10.1 The Committee relies on the assistance provided by relevant Ministers, departments and local governments to undertake its function of scrutinising the large volume of delegated legislation within defined time constraints.

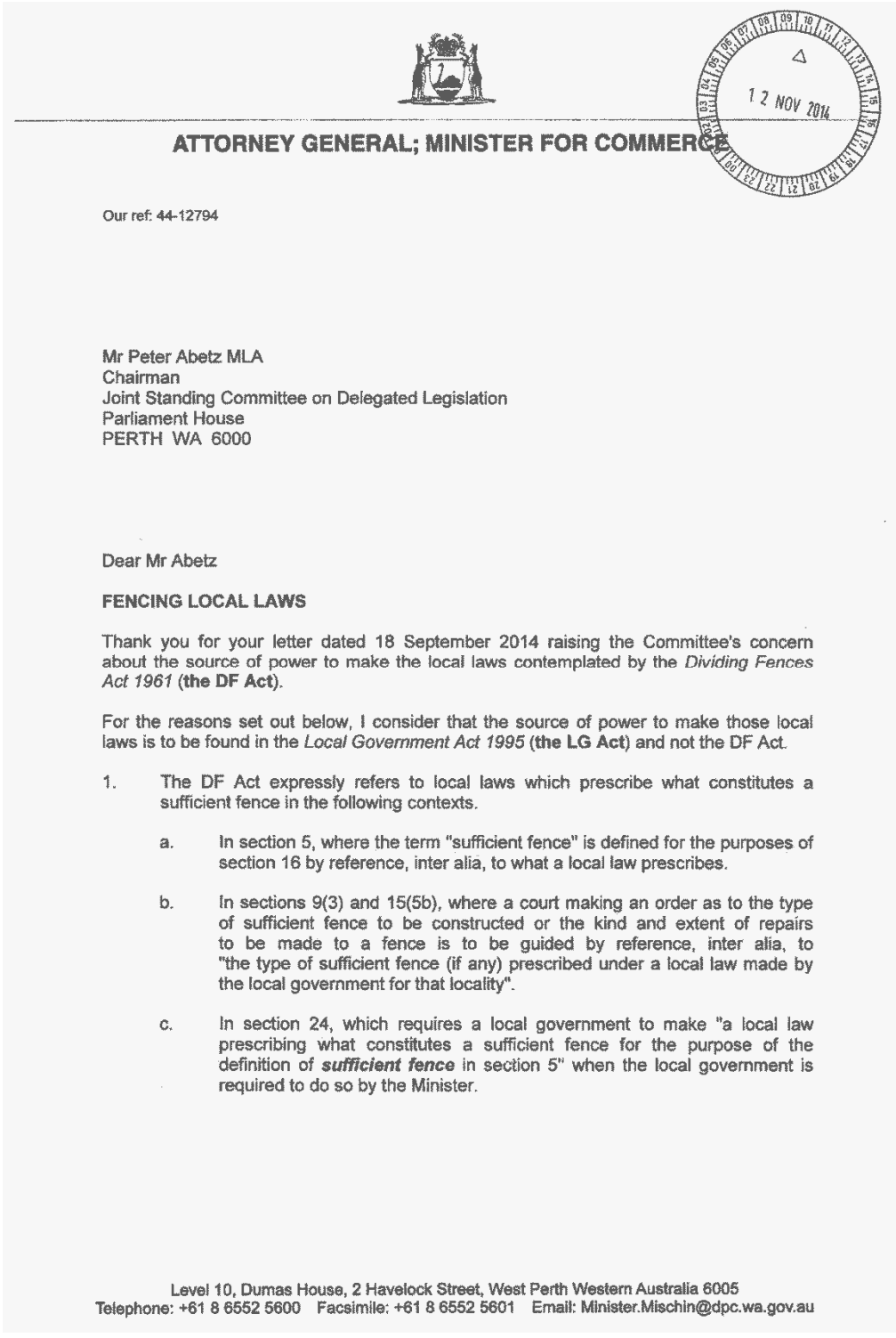
10.2 The Committee extends its appreciation to those Ministers, contact persons in departments and local governments who provided assistance.

Mr Peter Abetz MLA
Chairman

22 January 2015

APPENDIX 1

LETTER FROM THE ATTORNEY GENERAL REGARDING FENCING LOCAL LAWS



ATTORNEY GENERAL; MINISTER FOR COMMERCE

12 NOV 2014

Our ref: 44-12794

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Abetz

FENCING LOCAL LAWS

Thank you for your letter dated 18 September 2014 raising the Committee's concern about the source of power to make the local laws contemplated by the *Dividing Fences Act 1961* (**the DF Act**).

For the reasons set out below, I consider that the source of power to make those local laws is to be found in the *Local Government Act 1995* (**the LG Act**) and not the DF Act.

1. The DF Act expressly refers to local laws which prescribe what constitutes a sufficient fence in the following contexts.

   a. In section 5, where the term "sufficient fence" is defined for the purposes of section 16 by reference, inter alia, to what a local law prescribes.

   b. In sections 9(3) and 15(5b), where a court making an order as to the type of sufficient fence to be constructed or the kind and extent of repairs to be made to a fence is to be guided by reference, inter alia, to "the type of sufficient fence (if any) prescribed under a local law made by the local government for that locality".

   c. In section 24, which requires a local government to make "a local law prescribing what constitutes a sufficient fence for the purpose of the definition of ***sufficient fence*** in section 5" when the local government is required to do so by the Minister.

Level 10, Dumas House, 2 Havelock Street, West Perth Western Australia 6005
Telephone: +61 8 6552 5600 Facsimile: +61 8 6552 5601 Email: Minister.Mischin@dpc.wa.gov.au

2. None of those provisions expressly empowers a local government to make a local law prescribing what constitutes a sufficient fence. Instead, they recognise the possibility that such a local law may have been made (sections 5, 9(3) and 15(5b) of the DF Act) or that such a local law could be made by a local government (section 24).

3. If there was no other source of power for a local government to make such a local law, the power would have to be implied from the terms of the DF Act. Otherwise, the DF Act provisions which contemplate that such a local law could be made – in particular section 24 – could not have any operation. However, the power conferred by Division 2 of Part 3 of the LG Act to make local laws is wide enough to authorise the making of a local law prescribing what constitutes a sufficient fence. Given that express power, there is no need to imply a power to make such a local law in the DF Act.

4. That view is reinforced by section 3 of the DF Act, which provides that nothing in the DF Act affects the provisions of, inter alia, the LG Act and where any provision of the LG Act is inconsistent with any provision of the DF Act, the LG Act provision will prevail to the extent of the inconsistency.

5. This view is further reinforced by the legislative history of the DF Act and the LG Act.

   a. The LG Act's predecessor was the *Local Government Act 1960*.

   b. From the commencement of the *Local Government Act 1960*, sections 190 and 210 expressly authorised local governments to make by-laws about fencing and, more specifically, section 210(e) authorised the making of by-laws "prescribing what constitutes a 'sufficient fence' for the purposes of the Cattle Trespass, Fencing and Impounding Act, 1882..."

   c. The DF Act was enacted the following year and section 2 repealed the *Cattle Trespass, Fencing, and Impounding Act*. At the commencement of the DF Act, section 5's definition of a "sufficient fence" referred to by-laws made under section 210(e) of the *Local Government Act 1960*. Section 24 also referred to a by-law made under section 210(e) of the *Local Government Act 1960*, while section 9(3) referred to "the type of sufficient fence (if any) prescribed under a by-law made by the municipality for that locality". Section 15(5b) was not in force at that time.

6. Consequently, from its commencement the DF Act operated on the basis that by-laws prescribing what constituted a sufficient fence would be made under the *Local Government Act 1960* rather than the DF Act.

7. The *Local Government (Consequential Amendments) Act 1996* amended the DF Act to substitute references to local laws for the previous references to by-laws. However, those amendments did not change the source of power for local governments to make laws prescribing what constitutes a sufficient fence. They merely ensured that the language used in the DF Act was consistent with the language of the LG Act which had replaced the *Local Government Act 1960*.

For these reasons, I consider that the DF Act does not require amendment.

Thank you for drawing the Committee's concerns to my attention.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

10 NOV 2014