THIRTY-NINTH PARLIAMENT

REPORT 83

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2015

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

February 2016

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 during 2015:

Mr Peter Abetz MLA (Chairman)
Hon John Castrilli MLA
Hon Mark Lewis MLC
Mr Paul Papalia MLA
Hon Ljiljanna Ravlich MLC (to 10 March 2015)
Hon Robin Chapple MLC (Deputy Chair)
Hon Peter Katsambanis MLC
Ms Simone McGurk MLA
Hon Martin Pritchard MLC (from 5 May 2015)

Staff during 2015:

Stephen Brockway (Advisory Officer) (from March 2015)
Anne Turner (Advisory Officer (Legal)) (to October 2015)
Lauren Mesiti (Committee Clerk)
Denise Wong (Advisory Officer (Legal)) (to October 2015)
Kimberley Ould (Advisory Officer (Legal))
Sarah Costa (Advisory Officer) (from November 2015)

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ANNUAL REPORT 2015

EXECUTIVE SUMMARY

1 This *Annual Report 2015* outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee), describes some of the more notable instruments scrutinised and comments on significant issues arising from the Committee's scrutiny of delegated legislation during 2015.

2 The members' main task is to scrutinise, on behalf of the Parliament, those instruments that are made under statutory delegation by Ministers, by statutory bodies and by local governments, and to highlight any instruments that, in the Committee's view, are beyond the scope of the delegated power, or are otherwise in breach of the Committee's terms of reference (Terms of Reference).

3 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, on behalf of the Parliament of Western Australia. It considers whether each instrument subject to disallowance by Parliament complies with or offends any of the requirements set out in item 10.6 of its Terms of Reference, including whether the instrument is '*within power*' or '*contains only matter that is appropriate for subsidiary legislation*'. The Committee continues to scrutinise a large volume of delegated legislation. Between 1 January and 31 December 2015, the Committee was referred 508 gazetted instruments (including 319 regulations and 94 local laws).

4 During this period, only five instruments[1] were referred to Parliament for consideration as to whether they should be disallowed under section 42 of the *Interpretation Act 1984*. This does not reflect the volume of work undertaken by the Committee, as it does not take into account the work that goes on behind the scenes to agree amendments to regulations with Ministers, or to obtain undertakings from Ministers, departments or local governments to repeal, remake or amend regulations or local laws. Where such undertakings are given (and recorded on the Committee's website for educational purposes), then Notices of Motion for disallowance are

[1] *City of Fremantle Alfresco Dining Local Law 2014* (Report tabled 19 February 2015), *Shire of Kellerberrin: Cemeteries Local Law 2014; Activities on Thoroughfares and Trading in Thoroughfares and Public Places Local Law 201*4; *Local Government (Council Meetings) Local Law 2014* and *Fencing Local Law 2014* (Report tabled 12 March 2015).

usually not proceeded with in the Parliament. The Committee only recommends disallowance as a last resort.

5 In addition to the scrutiny of a large number of instruments in 2015, the Committee conducted its own motion inquiry into the use of Australian Standards in delegated legislation, commenced under the power in item 10.7 of its Terms of Reference. The Committee anticipates reporting on this inquiry in 2016.

6 Members of the Committee trust that the matters noted in this *Annual Report 2015* will assist drafters in understanding the Committee's processes, and the issues that have been taken with previous instruments, and inform the drafting of future delegated legislation.

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

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2015

1 INTRODUCTION

Overview

1.1 This *Annual Report 2015* outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee), describes some of the more notable instruments scrutinised in 2015 and comments on significant issues arising from the Committee's scrutiny of delegated legislation in 2015.

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 This Committee, like previous Joint Standing Committees on Delegated Legislation since 2001, considers only instruments of delegated legislation that are 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 and orders made by the Governor on the advice of statutory bodies and boards.

Committee Members

1.5 In 2015 the Committee was constituted by Members noted on the inside cover of this Report. Hon Ljiljianna Ravlich MLC served as a Committee member until 10 March 2015. Hon Martin Pritchard MLC was appointed on 5 May 2015.

Terms of Reference

1.6 The Committee's Terms of Reference are listed on the inside cover of this report. They were amended following a review of the Legislative Council Standing Orders in 2012–13 and 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 – Term of Reference 10.7(a)

1.7 This Term of Reference enables the Committee to report its views on a proposed template, pro forma or model local law.

1.8 In 2014, the Committee activated Term of Reference 10.7(a) for the first time when the Committee commenced an inquiry into the proposed template waste local law published by the Western Australian Local Government Association (WALGA). This inquiry concluded when the Committee tabled Report 77, *Inquiry into a Proposed Template Waste Local Law* on 27 November 2014.

1.9 In 2015 the proposed template waste local law was published by WALGA as a template, taking into account the comments made by the Committee in that Report.

1.10 The Committee thanks WALGA for its assistance during the inquiry process and trusts that the use of Term of Reference 10.7(a) will enhance the quality of waste local laws and the efficiency of the scrutiny process.

Reporting to Parliament on any systemic issue identified in two or more instruments of subsidiary legislation – Term of Reference 10.7(b)

1.11 This Term of Reference has recently been activated when the Committee initiated its inquiry into access to Australian Standards that have been incorporated into delegated legislation, as notified in its Report 74, *Inquiry into Access to Australian Standards Adopted in Delegated Legislation – Terms of Reference*. This activation of its own-motion inquiry powers follows comments and recommendations made in our Annual Reports for 2011 and 2012 regarding access to Australian Standards that were not acted upon by Government.

1.12 The Committee's inquiries are ongoing. Submissions have been received and hearings relating to this inquiry were held in August, October and November 2015. The Committee anticipates that it will publish its final report in the first half of 2016.

1.13 The Committee extends its thanks to all those who made submissions or gave evidence in person to the inquiry.

2 COMMITTEE ACTIVITIES

2.1 The Committee held 21 meetings in 2015.[2] A breakdown of activities in 2015, noting instruments gazetted up until 31 December 2015 is as follows.

Disallowable instruments referred	508
Regulations referred	319
By-laws (all by-laws were made by the Executive)	37
Local laws made by local government	94
Rules referred	14
Other instruments referred (including Region Planning Schemes, orders, notices and plans)	44
Notices of motion for disallowance given	23
Motions to disallow discharged	18
Hearings held by the Committee	14
Instruments where undertakings were provided to the Committee to amend the instrument	27
Reports tabled in 2015	5
Disallowance reports tabled in 2015	2
Instruments disallowed on recommendation of the Committee	5

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 it. 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 or clauses 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.

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 in the Legislative Council to recommend disallowance of the instrument. 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 (which, when moved, become Motions to disallow) are discharged from the Notice Paper following receipt of satisfactory responses from Ministers and councils of local governments.

[2] The first meeting was held on 18 February 2015 and the last on 25 November 2015.

2.5 When requested undertakings are provided, the usual course is for the Committee to accept the undertaking and recommend the discharge of the Motion to disallow. The statistics relating to this practice are at paragraph 2.1. When required, however, the Committee reports to the Parliament recommending the disallowance of the delegated legislation or clauses in the delegated legislation.

2.6 Most issues raised by the Committee in relation to delegated legislation arise because the Committee forms the view that the instrument (or a clause or clauses therein) offends the Committee's Term of Reference 10.6(a) and is therefore invalid. This Term of Reference 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)
- local government undertakings.

2.8 These lists inform stakeholders of issues the Committee has raised and assist departmental and local government officers in drafting delegated legislation. In particular, the local government undertakings list is a point of reference for local governments and their advisers to ascertain systemic problems with a particular type of 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. In 2015, 11 departmental and 16 local government undertakings were provided.

2.10 Twice a year, the Committee monitors whether delegated legislation has been amended within the agreed timeframe.

Sessional Resolution 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 14 to advise of the range of final decisions at the Committee's disposal in relation to Instruments. Sessional Resolution 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*
- *prepare a report for tabling in the Legislative Council and the Legislative Assembly.*

3 COMMITTEE REPORTS

3.1 In 2015 the Committee presented the following five reports to the Legislative Assembly and the Legislative Council:[3]

- Report 78 – *2014 Annual Report*, tabled on 22 January 2015
- Report 79 – *City of Fremantle Alfresco Dining Local Law 2014*, tabled on 19 February 2015
- Report 80 – *Shire of Kellerberrin: Cemeteries Local Law 2014; Activities on Thoroughfares and Trading in Thoroughfares and Public Places Local Law 2014; Local Government (Council Meetings) Local Law 2014* and *Fencing Local Law 2014*, tabled on 12 March 2015
- Report 81 – *Explanatory Report in relation to the School Education Amendment Regulations 2014*, tabled on 19 March 2015
- Report 82 – *Explanatory Report in relation to the Public Sector Management (Redeployment and Redundancy) Regulations 2014*, tabled on 7 May 2015.

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

4 EXPLANATORY MEMORANDA

Preparation

4.1 Departments, statutory authorities and local governments submit explanatory memoranda to the Committee via both electronic lodgement and hard copy.

4.2 The Committee continues to encounter instances where, in following up those who have not submitted an explanatory memorandum to the Committee within the required timeframe, responsible departmental or local government staff were either:

- not aware of the requirement to prepare such a document at all; or
- not sufficiently aware of the requirements governing their preparation as outlined in the *Premier's Circular Subsidiary Legislation – Explanatory Memoranda 2014/01* (Premier's Circular) for government departments and the *Local Laws Explanatory Memoranda Directions 04-2010 No.3* for local governments.[4]

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 expects departments, statutory authorities and local governments to ensure that all staff members 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.

4.5 During 2015, the Premier's Circular continued to assist the Committee to scrutinise departments' and agencies' fee amendments by requiring in explanatory memoranda a 'percentage of cost recovery achieved' column and identifying any cross-subsidisation between fees and charges.

[4] These can be found on the Committee's website at www.parliament.wa.gov.au (navigate to 'Committees', then 'Delegated Legislation Committee'), under the headings '(1) Committee Requirements for Local Governments' and '(2) Committee Requirements for Government Departments and Agencies'.

Standard of explanatory memoranda and responses to requests for explanations

4.6 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 were not.

4.7 The Committee acknowledges the high standard of work provided during 2015 by:

- the Western Australia Police
- the Department of Transport, which submitted explanatory memoranda and responses when required in relation to in excess of 60 instruments (containing consequential amendments) following the enactment of new road traffic legislation. This was done with efficiency and professionalism, at the same time as providing explanatory memoranda of a high standard in relation to the usual number of instruments from that department in the course of a year.

5 ISSUES RELATING TO REGULATIONS

Planning and Development (Development Assessment Panel) Amendment Regulations 2015

5.1 This instrument implemented changes to the legislated procedures of Development and Assessment Panels (DAPs), which are established under Ministerial order to determine land development applications of a scale larger than those considered by local governments or the Western Australian Planning Commission.

5.2 Amongst other changes, the instrument inserted the following new regulation 16(2A) into the *Planning and Development (Development Assessment Panels) Regulations 2011*:

> *If a provision of a planning instrument is inconsistent with a provision of these regulations, the regulations prevail to the extent of the inconsistency.*

5.3 The *Planning and Development Act 2005* (PD Act) elevates planning instruments[5] — comprising local planning schemes, region planning

[5] As defined in section 171A of the PD Act.

schemes, improvement schemes and interim development orders — to the status of Acts of Parliament.[6]

5.4 Therefore, new regulation 16(2A) provides that the principal regulations will prevail, in the event of an inconsistency, over planning instruments which the Parliament has intended will have the force and effect of an Act.

5.5 The Committee considered the issues of whether this subject matter is appropriate for subsidiary legislation under its Term of Reference 10.6(d), and whether the amendment regulations were within power under its Term of Reference 10.6(a).

5.6 Generally speaking, the priority of legislation is determined by Acts of Parliament; however, this unusual regulation sought to override legislation which is at a higher level in the usual hierarchy.

5.7 The Committee noted that Part 9 of the PD Act, entitled 'Relationship between planning schemes, planning control provisions and written laws', already deals with the priority of various types of legislative instruments promulgated by the PD Act. Sections 263(4) and (5) also deal with the priority of regulations with respect to other subsidiary legislation. It appeared to the Committee that Part 9 or section 263 may be more appropriate places to insert a provision in the nature of new regulation 16(2A).

5.8 The Committee considered whether new regulation 16(2A) was within power, specifically as the Committee could not identify any sections of the PD Act which authorised the making of regulations which would prevail over planning instruments in the event of an inconsistency. The Committee took the view that a general regulation-making power is not sufficient to authorise this type of provision.

5.9 As a result, the Committee sought and obtained undertakings from the Minister for Planning to:

- delete regulation 16(2A) of the principal regulations
- amend the PD Act by inserting a provision in the nature of regulation 16(2A) of the principal regulations.

[6] For example, in relation to local planning schemes, section 87(4) of the PD Act provides that a local planning scheme or amendment to a local planning scheme, when approved by the Minister and published in the Government Gazette, has full force and effect as if it were enacted by the PD Act.

Conservation and Land Management Amendment Regulations 2015

5.10 This instrument made amendments to the *Conservation and Land Management Regulations 2002*, and addressed management issues in relation to moorings on land and waters covered by the *Conservation and Land Management Act 1984* (CALM land).

5.11 Of interest to the Committee was an amendment to regulation 59(1) of the principal regulations to make it an offence, subject to a $2000 fine, to '*allow a mooring which the person owns or apparently controls to remain on CALM land.*'

5.12 This provision therefore applied to a person who installed a mooring before the principal regulations came into force, or before the land was gazetted as CALM land.

5.13 In addition, the amendment regulations enabled the Chief Executive Officer of the Department to require a legitimately constructed and operated private mooring to be removed or relocated if, in his or her view, it is 'in the public interest', with a failure to cooperate incurring a fine of $2,000 and possible forfeiture and removal.

5.14 The Committee considered that this aspect of the amendment regulations:

- made law that had a possible retrospective effect, and which may have a detrimental effect on the existing rights and interests of a foreseeable class of persons, which was not clearly authorised by Parliament in the enabling Act

- was an unreasonable and disproportionate means of achieving the objects of the Act, being the use, protection and management of the land, such that it cannot have been regarded as being within the contemplation of Parliament when the Act was made.

5.15 The Committee consulted with the Minister for Environment and held a hearing at which evidence was taken from three officers from the Department of Parks and Wildlife.

5.16 As a result, the Minister agreed to further amend regulation 59(1) to provide that a person would not commit an offence under that regulation unless the person:

- had received notice in writing of the requirement to either obtain authorisation for a mooring or to remove a mooring

- after receiving that notice, did nothing with a view to obtaining authorisation for the mooring or did not remove the mooring.

5.17 Additionally, the Minister agreed to include, on any infringement notices regarding a breach of the regulation, wording that explained to the recipient his or her right to make representations to the Minister with respect to the alleged infringement.

Family Court Amendment Regulations 2015, Family Court Amendment Repeal Regulations 2015, Family Court Amendment Regulations (No. 2) 2015* and *Family Court Amendment Regulations (No. 3) 2015

5.18 These instruments amended various fees payable in the Family Court of WA (FCWA), as a result of fee increases in the federal Family Court of Australia announced by the Commonwealth government.

5.19 The FCWA, uniquely, exercises both federal and state jurisdiction. The Commonwealth Parliament has constitutional power to legislate only with respect to marriage and children of a marriage. Legislative power over unmarried couples and their children vests in the Western Australia Parliament.

5.20 The *Family Court Amendment Regulations 2015* were made principally to effect fee increases and introduce three new fees for the FCWA. The fee changes were due to take effect on and from 1 July 2015 and mirrored the fee increases for the Family Court of Australia (Commonwealth jurisdiction), which were also planned to take effect on and from 1 July 2015.

5.21 However, following the Senate's disallowance of the Commonwealth fee increases, the *Family Court Amendment Regulations 2015* were repealed by the *Family Court Amendment Repeal Regulations 2015* on 30 June 2015, before the substantive clauses commenced operation.

5.22 Following the disallowance, new amendment regulations were made by the Commonwealth Executive and the Family Court of Australia's fee increases took effect on and from 13 July 2015.[7]

5.23 Once again, the *Family Court Amendment Regulations (No. 2) 2015* mirrored the fee changes for the Family Court of Australia, similarly effecting fee increases and introducing three new fees. The substantive clauses of the *Family Court Amendment Regulations (No. 2) 2015* commenced operation on

[7] Regulation 2 of the *Family Law (Fees) Amendment (2015 Measures No. 1) Regulation 2015* (Cth).

13 July 2015, and imposed fees which were $5 higher than those set by the *Family Court Amendment Regulations 2015*.

5.24 On 11 August 2015, the Senate disallowed the Commonwealth Executive's second attempt at increasing the Family Court of Australia's fees.[8] In response, the *Family Court Amendment Regulations (No. 3) 2015* were made, restoring the FCWA fees to their original levels prior to the *Family Court Amendment Regulations 2015*.

5.25 In scrutinising the amendment regulations, the Committee accepted that for reasons of both equity and administrative efficiency, it was desirable that the fees applicable in the federal and state jurisdictions of the FCWA should mirror each other.

5.26 The Committee noted that the Department had not provided tables containing the various fee details required by the Premier's Circular. The Committee was advised that the FCWA could provide the Committee with a whole-of-jurisdiction cost recovery figure if the Committee so requested. This would be much the same as the information given to the Committee by all of the other state courts and tribunals since the Committee's Report 75,[9] which gives an account of the Committee's scrutiny of the 2014 fee increases for those courts and tribunals.

5.27 The Committee did not consider fees of the FCWA in its Report 75 because the fees underwent an automatic CPI increase on 1 July 2014, pursuant to regulation 21I of the *Family Court Regulations 1998*. An amending instrument was not required for that increase and, therefore, the 2014 fee increases for the FCWA did not come before the Committee for consideration.

5.28 These amendments were also the first time FCWA fee changes had come before the Committee since the Premier's Circular (requiring a more detailed fee table), which was issued in February 2014.

5.29 The Committee concluded that the *Family Court Amendment Regulations (No. 2) 2015* and *Family Court Amendment Regulations (No. 3) 2015* were validly made and within power. Given the FCWA's advice that it was operating at a loss, the Committee considered that it was reasonable to assume that the FCWA was not over-recovering on its fees as a whole. Since the Committee's Report 75, this approach has been accepted by the Committee

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8 Parliament of Australia, Senate, *Parliamentary Debates (Hansard)*, 11 August 2015, pp 42-49.

9 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 75, *Identifying a Systemic Issue arising out of Nine Court and Tribunal Instruments*, 18 September 2014.

with respect to state courts and tribunals. The Committee also accepted the arguments for parity of fees between married and unmarried couples.

5.30 The Committee requested the FCWA, in future, notwithstanding its unique position, to comply with the Premier's Circular (to the extent possible) in relation to any amending regulations which effect changes to FCWA fees, and to provide a fee table in relation to its fees.

6 ISSUES RELATING TO LOCAL LAWS

Template waste local law

6.1 The Committee's comments regarding WALGA's template waste local law are contained in paragraphs 1.7 to 1.10 of this Report.

Assistance animals

6.2 In its *Annual Report 2014*,[10] the Committee noted that it had negotiated with the Minister for Local Government to request the Governor to make a global amendment to problematic clauses in local laws which were inconsistent with the provisions of the *Disability Discrimination Act 1992 (Cth)* concerning assistance animals. At the time of that report, Parliamentary Counsel's Office had reviewed over 300 local laws.

6.3 On 6 January 2015, three Governor's local laws[11] were gazetted to amend all local government property local laws and cemeteries local laws currently in force in Western Australia, by the insertion of a clause that ensures consistency with federal anti-discrimination legislation.

City of Fremantle Plastic Bag Reduction Local Law 2015

6.4 In 2013, the Committee considered the *City of Fremantle Plastic Bag Reduction Local Law 2012*, which was the first local law introduced by a local government in Western Australia regarding the regulation of the use of plastic carrier bags.

6.5 Scrutiny by the Committee of this local law required it to consider whether the subject matter of the local law was encompassed within the broad range of matters on which local governments in Western Australia can make local laws pursuant to the *Local Government Act 1995*. In particular, the Committee

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10 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 78, *Annual Report 2014*, 22 January 2015, p 13 para. 7.22.

11 *Cemeteries Amendment Local Law 2014*, *Local Government Amendment (Cuballing and Popanyinning Cemeteries) Local Law 2014*, and *Local Government Amendment (Property) Local Law 2014.*

considered whether the local law had the effect of interfering with the existing rights of shopkeepers to trade as they wished (then Term of Reference 6.6(b)) and whether this was a matter more appropriate for primary legislation (then Term of Reference 6.6(d)).

6.6 The Committee tabled Report No. 67 in October 2013 and, following debate on that report, the *City of Fremantle Plastic Bag Reduction Local Law 2012* was disallowed by the Legislative Council on 29 October 2013.

6.7 In 2015, the Committee considered the new *City of Fremantle Plastic Bag Reduction Local Law 2015*. The Committee did not table a Notice of Motion to disallow the instrument, and did not table a further report in the Parliament.

6.8 However, a Member of the Legislative Council did table such a motion in his own name. The motion was debated in the Legislative Council on 13 October 2015 and the *City of Fremantle Plastic Bag Reduction Local Law 2015* was disallowed.

Buffer distances for intensive and non-intensive piggeries in health local laws

6.9 Some health local laws tabled in 2015 contained anomalies in the required buffer distances for intensive and non-intensive piggeries from '*isolated rural dwellings, dairies or industries*'.[12]

6.10 The *National Environmental Guidelines for Piggeries Second Edition (Revised) 2010*, was in one instance referred to by the local government concerned in relation to the calculation of buffer distances. Enquiries by Committee staff revealed a view within local governments that those Guidelines were complex and not user-friendly and are therefore unhelpful in drafting and interpreting local laws.

6.11 The specific issue identified by the Committee was that the required buffer distance from an isolated rural dwelling, diary or industry in the case of a non-intensive piggery was significantly larger than the distance required in the case of an intensive piggery.

6.12 The Committee sought and obtained undertakings from the two local governments concerned to amend the local laws to increase the required buffer distance in the case of intensive piggeries.

6.13 The Committee notified the Minister for Health of the issue, and of the absence of useful guidance in the *National Environmental Guidelines for Piggeries Second Edition (Revised) 2010*.

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12 *Shire of Mount Marshall Health Local Law 2014* and *Shire of Mukinbudin Health Local Law 2014*.

6.14 Following consultation with the Minister for Health and the Minister for Local Government, it is proposed that other similar local laws be amended by a Governor's amendment local law to be prepared by the Department of Health.

Restriction of smoking on beaches

6.15 During 2015 the Committee considered the *City of Joondalup Local Government and Public Property Local Law 2014*, which included the following clause:

> *A person must not smoke in contravention of a sign erected on a beach which prohibits the act of smoking.*

6.16 On the same issue, the Committee also considered a letter from Paul Miles MLA regarding a newspaper report that the Town of Cottesloe was intending to introduce a similar smoking ban on its beaches. He requested that the Committee review the ban on the grounds that it exceeded local government powers.

6.17 Section 3.5(1) of the *Local Government Act 1995* states:

> ***Legislative power of local governments***
>
> *(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.* [Committee emphasis]

6.18 The 'function' referred to comes from section 3.1 of the Act, which states:

> ***General function***
>
> *(1) The general function of a local government is to provide for the good government of persons in its district.*
>
> *(2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.*
>
> *(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government.* [Committee emphasis]

6.19 The Committee considered the decision of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide*,[13] otherwise known as '*Courneloup's case*', in which the High Court considered the scope of the general function of a local government. It also considered the *Tobacco Products Control Act 2006*, and specifically its prohibition of smoking between the flags on patrolled beaches, as amended in 2009 by the *Tobacco Products Control Amendment Act*. The question for the Committee was whether this state-wide legislation effectively 'covered the field' in this regard.

6.20 Finally, the Committee also took into account the regulation-making power in the 2006 Act which allows for the banning of smoking in public places, and considered whether this would be the preferred method of introducing a ban that covered areas outside the flags on a beach.

6.21 After considering all relevant matters, the Committee took the view that this particular matter fell within the powers of a local government to make laws for the good government of the locality, which included physical areas outside of what was dealt with in state-wide laws. It therefore did not recommend the disallowance of this instrument.

Cat local laws – Governor's global amendment

6.22 In 2014 the Committee scrutinised Part 2 of the *Shire of Dardanup Keeping and Control of Cats Local Law 2014*,[14] which prescribed that it was an offence to have a cat in a public place[15] without the cat being, in the opinion of an authorised person, under 'effective control'. This local law also prescribed that it was an offence to allow a cat to be in any 'other place' unless consent had been given by the occupier or on behalf of the occupier, and the cat was under 'effective control'.

6.23 The Committee resolved that Part 2 was inconsistent with or repugnant to the *Cat Act 2011*[16] and therefore not within power.[17] Further, as Part 2 constituted a significant change to existing policy relating to cats, the Committee felt that it was not a matter appropriate for subsidiary legislation.[18] The Committee sought and obtained undertakings from the Shire of Dardanup to repeal Part 2 of the Local Law.

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13 (2013) 249 CLR 1.

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

15 'public place' included 'any place to which the public may lawfully have access'.

16 Specifically, sections 27 and 79(3).

17 See Committee Term of Reference 10.6(a).

18 See Committee Term of Reference 10.6(d).

6.24 The Committee also identified that five other local laws contained identical or similar provisions.

6.25 As a result, in November 2014, the Committee asked the Minister for Local Government to give consideration to requesting the Governor to repeal the offending clauses pursuant to section 3.17 of the *Local Government Act 1995.*

6.26 The Minster made the request of the Governor and a local law amending the offending clauses was made on 24 July 2015.

Definitions of 'local government' and 'Council' in local laws

6.27 During 2015 the Committee received a request from the City of Perth for clarification regarding the definitions of the terms 'City' and 'Council' in the *City of Perth Parking Local Law 2010*.

6.28 Clarification was sought because the local law did not permit the delegation of certain parking tasks and decisions. In particular, the definition of 'Council' in the local law did not permit the delegation of parking tasks and decisions clearly within the purview of the administrative arm of a local government.

6.29 The Department of Local Government's *Guideline 17 on Delegations* states that the use of the term 'Council' means that the Council itself must carry out the relevant task, whereas if the term 'local government' is used, delegation to the administrative arm is possible.

6.30 The Committee recommended an amendment to the local law in the following manner:

- Deletion of the term 'City'.
- Insertion of a definition of 'local government' to mean 'the local government of the City of Perth'.
- Insertion of a definition of 'Council' to mean 'the council of the local government'.
- Insertion of a definition of 'CEO' to mean 'the Chief Executive Officer of the local government'.

6.31 The Committee's predecessor during the 38th Parliament also commented on the use of the terms 'local government' and 'City' in local laws in previous

Annual Reports in which they expressed the view that local laws should use the term 'local government' rather than 'City', 'Shire' or 'Town'.[19]

Presentation of petitions in standing orders local laws

6.32 The Committee considered the *Shire of Halls Creek Standing Orders Local Law 2015*, clause 3.5(3) of which stated:

> *It shall be incumbent on the member of Council presenting the petition to be familiar with the nature and contents of the petition, and to ascertain that it is in the form prescribed by subclause (1).*

6.33 It was noted that there is no equivalent to subclause 3.5(3) in the 2014 WALGA template meeting procedures local law, and that it would result in a member of Council who failed to comply with subclause (3) being in breach of the local law.

6.34 The Committee took into account the fact that, under the local law, there were two courses of action for the Council in dealing with a breach of subclause 3.5(3), either:

- it could impose a penalty of '$*1,000 and a modified penalty of $100*'; or
- via subclause 18.3(3), it could apply the procedures in the *Local Government (Rules of Conduct) Regulations 2007*.

6.35 Members were of the view that the phrase '*It shall be incumbent*' means '*It is imposed as an obligation or duty*'. Not to comply would therefore constitute a serious offence when, arguably, it relates to what is essentially an administrative task.

6.36 The Committee took the view that the administrative arm of a local government should determine whether a petition is '*effective*', similar to how the Procedure Office staff in the Parliament determine if a petition is effective[20] before a Member of Parliament presents it.

6.37 It was determined that the Council had provided an implied authorisation in the local law for a Councillor to complete an administrative duty pursuant to

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19 See for example Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 61, *Annual Report 2012*, 15 November 2012, p 28 para. 6.73; and Report 49, *Annual Report 2011*, 3 May 2012, pp 10 – 11 paras. 5.15 – 5.17, referring to Report 46, *City of Gosnells Waste Local Law 2011* and *Shire of Derby/West Kimberley Waste Services Local Law 2011* pp 4 – 5 paras. 3.6 – 3.15.

20 The term used in the Legislative Council Standing Orders is "conforming".

regulation 9(1) of the *Local Government (Rules of Conduct) Regulations 2007*.[21] However, the Committee was of the view that this was an inappropriate authorisation.

6.38 The Committee further determined that subclause 3.5(3) was inconsistent with the *Local Government Act 1995*, particularly, sections 1.3, 2.7 and 2.10, in that the Act did not contemplate that it was '*incumbent*' on a Councillor '*to be familiar with the nature and contents of the petition*' and whether or not a petition is '*effective*'.

6.39 Whereas subclause 3.5(3) imposed a duty or obligation on communications between a petitioner and the 'petition presenting Councillor', the Act prescribes the role as that of a facilitator. The Committee considered that the scheme underlying the *Local Government Act 1995* was for a Councillor to represent the interest of electors by exercising their own judgment. Councillors know when they are elected that they need to understand the issues in order to represent their Ward. How they exercise their role is for them and their judgment.

6.40 The Committee considered that subclause 3.5(3) was disproportionate to the exercise of the power in section 3.5 of the *Local Government Act 1995* to make local laws. The proportionality test for determining whether a local law is 'within power' is as follows:

> *The legislature does not intend that the power to enact delegated legislation would be exercised beyond what was reasonably proportinate to achieve the relevant statutory object or purpose.*[22]

6.41 Further, the Committee considered subclause 3.5(3) unreasonable because it mandated that a Councillor undertake what is essentially an administrative role. A touchstone of reasonableness is implied in all empowering provisions. Mandating that it is '*incumbent*' on a democratically and validly elected Councillor to do something is contrary to the theory of democratic representative government upon which local government is based. It is reasonable to expect that an adult, democratically elected Councillor will determine how they exercise their duty when presenting a petition. Instead, were the local law in question be allowed to stand, the Councillor would be subjected to a penalty of $1,000 or a modified penalty of $100.

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21 Those Regulations did not exist in 2003 when the Shire of Broome first drafted the equivalent of subclause 3.5(3) and which is, relevantly, absent penalties.

22 *Vanstone v Clarke* (2005) 147 FCR 299 at 337-52.

6.42 Accordingly the Committee found that subclause 3.5(3) was both a disproportionate and an unreasonable exercise of the power provided to local governments to make laws, and it therefore breached Committee Term of Reference 10.6(a).

6.43 The Committee sought and obtained an undertaking from the Shire to delete subclause 3.5(3).

Identification of cemetery Boards in cemetery local laws

6.44 The *Shire of Cunderdin Cemetery Local Law 2015*, regulating both the Cunderdin and Meckering cemeteries, was made under section 55 of the *Cemeteries Act 1986* and section 3.12 of the *Local Government Act 1995*. Section 54 of the *Cemeteries Act 1986* sets out the procedure for cemetery local laws:

> ***54. Procedure for local laws and by-laws***
>
> *(1) A Board that is a local government may make local laws in accordance with subdivision 2 of Division 2 of Part 3 of the Local Government Act 1995 for the purposes specified in section 55.*

6.45 Contrary to the WALGA template cemetery local law, this local law did not include a definition of "Board". The WALGA template guides a local government to include a definition in the following way:

> ***"Board"*** *means the [insert name of local government];*

6.46 The Committee questioned whether or not the Shire was in fact '*A Board*' for the purposes of section 54(1).

6.47 Section 3 of the *Cemeteries Act 1986* states:

> *Board means a cemetery board established under section 7 or deemed to have been established under this Act and in relation to a cemetery means the Board responsible for the care, control and management of that cemetery;*

6.48 Section 5 of the Act states:

> ***Vesting of management of cemetery***
>
> *The Governor may by order published in the Gazette vest the care, control and management of a cemetery in a Board or a local government and may by further order, so published,*

> *transfer the care, control and management of a cemetery from a Board to a local government or from a local government to a Board.*

6.49 Section 7 states:

> ***Establishment of Boards***
>
> *(1) The Governor may by order published in the Gazette establish a cemetery board to perform with respect to a cemetery, or to more than one cemetery, the functions conferred or imposed on Boards under this Act.*

6.50 Research suggested that the Shire of Cunderdin was a 'Board' for the purposes of the *Cemeteries Act*. However, despite section 5 above, section 54(2) – the empowering section - made it clear that it is '*A Board*' that makes local laws, hence the Shire is required to insert a definition of '*Board*' in its local law. This approach is consistent with the WALGA template.

6.51 The Committee took the view that in the absence of further information from the Shire, it should be requested to include a definition of 'Board' and make the necessary consequential amendments in other parts of the local law as per the WALGA template.

6.52 The Shire provided an undertaking to insert a definition of '*Board*' in the local law.

Section 3.12 of the *Local Government Act 1995*

6.53 The Committee's Annual Reports from 2011 to 2014 have 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*.

6.54 In its *Annual Report 2012*, the Committee noted its concern that recommending disallowance of a local law in circumstances where section 3.12 is substantially complied unnecessarily impacts on the Committee, Parliament and local government time and resources.[23]

[23] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 61, *Annual Report 2012,* 15 November 2012, p 16 para. 6.12.

6.55 The Committee also recommended in its Reports 48 and 51 that section 3.12 be amended '*to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of a local law*.'[24]

6.56 In 2015, the issue of non-compliance with section 3.12 arose in the Shire of Kellerberrin's *Cemeteries Local Law 2014*, its *Activities on Thoroughfares and Trading in Thoroughfares and Public Places Local Law 2014*, the *Local Government (Council Meetings) Local Law 2014* and its *Fencing Local Law 2014*. The Legislative Council disallowed those instruments on the Committee's recommendation following the tabling by the Committee of its Report 80 on 12 March 2015.

6.57 The Department of Local Government and Communities has previously advised the Committee 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.[25] The proposed amendment is as follows.

> *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.*

6.58 This 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*

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[24] Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 48, *Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012, p 4; and Report 51, *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012, p 5.

[25] 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.

> *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.*[26]

6.59 The Committee supports the proposed amendment.

6.60 At the Local Laws Working Group meeting held on 21 September 2015,[27] the Department of Local Government and Communities provided an update. The amendment is contained in the Local Government Legislation Amendment Bill 2014, which is currently before the Parliament.

6.61 If the Bill is passed, the Committee will have the primary task of determining whether 'substantial compliance' has occurred and whether any defect in the law-making process is serious enough to recommend disallowance of a local law.

6.62 In the meantime, the Committee has noted that there had been a general improvement in local government compliance with the law-making process established by section 3.12.[28] This is perhaps the result of training provided by WALGA and of the procedural safeguards initiated by, and the careful

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26 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 49, *Annual Report 2011*, 3 May 2012, pp 9-10.

27 See paras. 8.1 – 8.7 below.

28 For example, in the Committee's *Annual Report 2012*, it was noted that in that year, nine reports recommended disallowance of 10 instruments for failure to comply with section 3.12 (para 6.4). All of those 10 instruments were disallowed by the Legislative Council. In each of 2013 and 2014, one instrument was disallowed by the Legislative Council for failure to comply with section 3.12. In 2015, the number has risen again to five. This is largely because the Shire of Kellerberrin failed to supply any of its draft local laws to the Department for scrutiny.

scrutiny carried out by, officials within the Department of Local Government and Communities. The Committee's thanks go to both.

Local Government correspondence

6.63 The Committee continues to experience problems with Mayors and Shire Presidents failing to sign correspondence notifying the Committee of their Councils' resolutions, including the giving of undertakings to the Committee. Instead, the Committee receives correspondence signed by chief executive officers, rangers and environmental health or planning officers.

6.64 As the Committee is part of the legislative arm of Government, it must communicate with, and receive responses from, the legislative arm of local governments, not the executive (administrative) arm.

7 FEES AND CHARGES

7.1 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.[29]

7.2 The Committee's task was made easier from 2014 by the publication of the Premier's Circular. During this year's annual fee and charge review period, some departments, agencies and statutory authorities still required assistance from Committee staff to comply with the Circular's requirements for fees and charges tables. However, once agencies understood the requirements, the information was promptly provided.

7.3 The Committee is pleased to note that the level of compliance with the Premier's Circular continues to improve, with more agencies applying the requirements for fees and charges tables in explanatory memoranda without further follow up by Committee staff.

Road Traffic (Authorisation to Drive) Regulations 2014* and *Road Traffic (Vehicles) Regulations 2014

7.4 In its consideration of these instruments, the Committee noted that while some fees were either at or close to 100 per cent recovery, many over-recovered by a small margin, possibly due to rounding up.

7.5 The Committee routinely requires an agency or department to reduce any fee increase that results in a cost recovery that is more than 100 per cent. The Committee takes the position that any fee or charge over 100 per cent is an unauthorised tax.

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

7.6 The Committee sought confirmation from the Minister for Transport as to whether rounding up was a factor in over–recovery in this case.

7.7 The Minister for Transport responded that the fees referenced by the Committee were identified in the Department of Transport's annual review process for fees and charges and have been revised for the 2015-16 financial year to be at or slightly below 100 per cent cost recovery.

8 LOCAL LAWS WORKING GROUP

8.1 The Local Laws Working Group (Working Group) comprises representatives from the Office of the Minister for Local Government, the Department of Local Government and Communities, the Local Government Managers' Association (Western Australia), WALGA, the Department of Health and the Department of Environment Regulation, 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.

8.2 The Working Group meeting is an annual event, which this year took place on 21 September 2015.

8.3 The meetings continue to provide a useful forum for all involved in the local law making process to update participants on new developments and initiatives, as well as resolving any matters of dispute. The Committee takes this opportunity to thank the representatives of each of the bodies listed above, each of whom makes the meetings worthwhile.

The proposed Public Health Bill

8.4 At the Working Group meeting, the Department of Health provided an update on the proposal to remove the local law making power from the current health legislation. The proposal is contained in the Public Health Bill 2015, which has been tabled in Parliament.

8.5 The Bill proposes the removal of the heads of power from the *Health Act 1911* which currently empower local governments to make health local laws. Future health local laws would be made under the heads of power provided by the *Local Government Act 1995*. These local laws would only cover matters which are not already addressed in legislation and future health regulations.

8.6 The Department of Health confirmed that local governments would eventually need to make new health local laws as part of the transition to the new legislative regime. The heads of power in the *Health Act 1911* were unlikely to be removed for at least two to five years, meaning there was more than adequate time for transitional processes to be implemented.

8.7 As noted in its *Annual Report 2014*, the Committee is of the view that sections 3.1 and 3.5 of the *Local Government Act 1995* would authorise the making of 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 the consent of the Executive Director of Public Health, as is currently the practice.

Development of WALGA template health local law

8.8 Further to this, the Department of Health confirmed that it was participating in a joint project with WALGA to develop a new template health local law. The intention is to provide an easily accessible template that local governments could use to transition to the new legislative regime proposed by the Public Health Bill. The Committee commends this initiative.

9 CONCLUSION

9.1 The Committee relies on the assistance provided by relevant Ministers, departments and local governments in undertaking its function of scrutinising the large volume of delegated legislation that comes its way and within defined time constraints.

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

9.3 Members looks forward to another productive and fulfilling year in 2016, providing the necessary oversight role on behalf of Parliament, and giving guidance where necessary to Ministers, to departments and to local governments alike.

Peter Abetz

Mr Peter Abetz MLA
Chairman

18 February 2016