

40TH PARLIAMENT



Report 10

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Annual Report 2017

Presented by
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and

Hon Robin Chapple MLC (Deputy Chair)

May 2018

Joint Standing Committee on Delegated Legislation

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EXECUTIVE SUMMARY

Introduction

- 1 This *Annual report 2017* discusses some of the key activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January and 31 December 2017.
- 2 The Committee's role is to scrutinise, on behalf of the Parliament, instruments made under statutory delegation by:
 - the Governor in Executive Council
 - Ministers
 - statutory bodies
 - local governments.
- 3 The Committee determines whether the instruments are beyond the scope of the delegated power or are otherwise in breach of the Committee's Terms of Reference.

Committee activities

- 4 The Committee continues to scrutinise a large volume of delegated legislation. In the reporting period, the Committee was referred 404 instruments, including 190 regulations and 141 local laws.
- 5 The Committee tabled six reports in the Parliament. In four of those reports, the Parliament was asked to consider whether five instruments should be disallowed—all five instruments were disallowed by the Legislative Council.
- 6 This disallowance figure does not reflect the volume of work undertaken by the Committee behind the scenes to:
 - reach agreement with the legislators on issues identified by the Committee
 - obtain undertakings from the legislators to repeal, re-make or amend delegated legislation.
- 7 Motions for the disallowance of delegated legislation usually do not proceed in the Parliament if satisfactory undertakings are given to the Committee. The Committee only recommends the disallowance of an instrument as a last resort. During 2017, the Committee received four departmental and 30 local government undertakings.

Issues relating to regulations and rules

- 8 The Committee encountered two sets of amendment regulations which had the effect of abrogating a fundamental common law principle. The Committee found that, in each case, the abrogation was not authorised by the empowering Acts. Satisfactory undertakings were received in both instances.

Issues relating to local laws

- 9 Four local laws breached their empowering Acts due to procedural defects. The Parliament disallowed these instruments at the Committee's recommendation. Refer to paragraphs 4.9–4.14.
- 10 The Committee dealt with systemic issues in:
 - waste local laws

- animals, environment and nuisance local laws
- waste-related provisions in non-waste local laws.

These issues did not result in disallowances because the affected local governments provided the Committee with acceptable undertakings.

- 11 Section 3.12(2A) of the *Local Government Act 1995* excuses minor procedural errors in local law-making. It has now been operating for over 12 months and 2017 is the first year in which the Committee has had the opportunity to apply it. Refer to paragraphs 4.3–4.14
- 12 Members of the Committee trust that the matters noted in this report will assist persons and bodies making delegated legislation to understand the Committee’s processes and the issues identified in previous instruments.

1 Introduction

Overview

- 1.1 This report:
- outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee)¹ between 1 January and 31 December 2017
 - discusses some of the more notable instruments considered by the Committee
 - comments on significant issues arising from the Committee's scrutiny of delegated legislation.
- 1.2 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider instruments of delegated legislation that have been published.² Like its predecessors, the Committee in this 40th Parliament considers only:
- instruments that are subject to parliamentary disallowance³
 - instruments noted by an individual Member.
- 1.3 The majority of the instruments considered are regulations made by the Executive Government via the Governor in Executive Council. Other instruments include local laws made by 140 local governments,⁴ court rules, by-laws, planning schemes, orders, notices, plans and other variously-named instruments made by a range of persons or bodies.

Terms of Reference

- 1.4 The Committee's Terms of Reference are listed on the back inside cover of this report. They were adopted by the Parliament on 15 June 2017, when the Committee was established. The Committee operates under the *Standing Orders of the Legislative Council*.⁵
- 1.5 The Committee considers whether an instrument 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'.

Committee Members

- 1.6 In 2017, the Committee was constituted by the Members noted on the front inside cover of this report.

¹ Being a joint committee of both Houses of Parliament, the Committee in the 39th Parliament ceased to exist upon the dissolution of the Legislative Assembly (and, as it happened, the prorogation of the 39th Parliament) on 30 January 2017. The Committee of the 40th Parliament was established by both Houses on 15 June 2017: Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 15 June 2017, p 951 and Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 June 2017, p 1048.

² Either under section 41(1)(a) of the *Interpretation Act 1984* or another written law: Committee Term of Reference 10.5: *Standing Orders of the Legislative Council* Schedule 1, cl 10.5.

³ Pursuant to section 42 of the *Interpretation Act 1984* or another written law.

⁴ Department of Local Government, Sport and Cultural Industries, 14 September 2016, Government of Western Australia, Perth, viewed 7 February 2018, <<https://www.dlhc.wa.gov.au/AdviceSupport/Pages/Local-Government.aspx>>.

⁵ *Standing Orders of the Legislative Council* Standing Order 156.



Figure 1. Committee Members in 2017

Back (left to right): Hon Martin Pritchard MLC, Mrs Robyn Clarke MLA, Hon Kyle McGinn MLC, Hon Charles Smith MLC

Front (left to right): Ms Emily Hamilton MLA (Chair), Hon Robin Chapple MLC (Deputy Chair)

Missing from photograph: Ms Libby Mettam MLA, Mr Ian Blayney MLA

Committee process

- 1.7 When the Committee has questions about an instrument, it usually writes to or contacts the relevant Minister or local government President or Mayor and requests further information to assist in its examination of the instrument. In many instances, the responses received address the Committee's questions and no further action is taken.
- 1.8 When the Committee identifies an issue of concern and forms the view that a clause or clauses in the instrument offend the Committee's Terms of Reference, it usually seeks an undertaking from the responsible Minister or local government to amend the instrument.
- 1.9 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. The Committee monitors whether delegated legislation has been amended within the agreed timeframe.
- 1.10 While the Committee awaits the response to investigations or its request for undertakings on a particular instrument, it is often necessary to authorise a Committee Member to give notice of motion to disallow the instrument in the Legislative Council.⁶ Notice must be given within 14 sitting days after the instrument is tabled in the Parliament.⁷ The vast majority of these

⁶ The Legislative Council has procedures in place for dealing with motions for disallowance, including those motions which are instigated by the Committee: refer to *Standing Orders of the Legislative Council* Standing Order 67.

⁷ *Interpretation Act 1984* s 42. Note that other Acts may provide for a different period during which Notices of Motion to disallow their delegated legislation may be given.

notices of motion⁸ are later discharged from the Legislative Council Notice Paper following receipt of satisfactory responses from Ministers and local governments.

- 1.11 When requested undertakings are provided, the usual course is for the Committee to accept the undertakings and recommend the discharge of the motion to disallow.⁹ However, when required, the Committee reports to the Parliament recommending the disallowance of all or part of the instrument. The Committee only recommends the disallowance of an instrument as a last resort, that is:
- where agreement cannot be reached on acceptable arrangements
 - where the identified defect in the instrument cannot be cured without re-making the instrument—for example, because statutory procedures for the making of the instrument were not followed.
- 1.12 Most issues raised by the Committee arise because the Committee forms the view that the instrument is not authorised by the empowering Act¹⁰ and is therefore invalid.

Undertakings lists

- 1.13 The Committee posts two lists of undertakings on its webpage (www.parliament.wa.gov.au/del), namely:
- departmental undertakings (undertakings provided by Ministers, government departments, agencies and statutory authorities)
 - local government undertakings.
- 1.14 These lists inform stakeholders of issues the Committee has raised and assist departmental and local government officers in drafting delegated legislation. In particular, the local government undertakings list allows local governments and their advisers to identify systemic problems in local laws.

Acknowledgments

- 1.15 The Committee relies on the assistance provided by relevant Ministers, departments, statutory bodies and local governments in undertaking its function of scrutinising a large volume of delegated legislation within defined time constraints. The Committee extends its appreciation to those Ministers and contact persons who provided that assistance.
- 1.16 In particular, the Committee thanks:
- the Department of Local Government, Sport and Cultural Industries (DLGSC), which acts as a valuable filter in dealing with problematic proposed local laws, thus resolving many issues before the local laws are formally made, gazetted and then referred to the Committee
 - the Western Australian Local Government Association (WALGA), another valued source of local laws information and expertise for local governments.

⁸ Which usually become motions to disallow on the third sitting day after they have been given: *Standing Orders of the Legislative Council* Standing Order 67(3).

⁹ The statistics relating to this practice are contained in Table 1 on page 4.

¹⁰ See Committee Term of Reference 10.6(a): *Standing Orders of the Legislative Council* Schedule 1, cl 10.6(a). This Term of Reference provides that the Committee is to inquire into whether an instrument 'is within power' of the empowering Act.

2 Committee activities in 2017

Volume and nature of work

2.1 The Committee held 11 meetings in the reporting period, and the following table provides a breakdown of the Committee's activities in respect of instruments gazetted during that period. The figures in the table do not demonstrate that many of the instruments considered by the Committee are lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.

Table 1. The Committee's work statistics for 2017

Disallowable instruments gazetted	404
<i>Regulations</i>	190
<i>By-laws (made by the Executive)</i>	9
<i>Local laws (made by local government)</i>	141
<i>Rules</i>	16
<i>Other instruments referred (including planning schemes, orders, notices and plans)</i>	48
Notices of motion for disallowance given	49
Motions to disallow discharged	32
Hearings held by the Committee ¹¹	1
Instruments where undertakings were provided to the Committee to amend the instrument	24
Reports tabled in 2017 ¹²	6
Disallowance reports tabled in 2017 ¹³	4
Instruments disallowed on recommendation of the Committee ¹⁴	5

Committee reports

2.2 In 2017, the Committee presented the following six reports to the Legislative Assembly and the Legislative Council:

¹¹ Refer to paragraphs 4.1–4.2.

¹² Refer to paragraph 2.2 for a list of these reports.

¹³ 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 2, *Town of Cambridge Local Government and Public Property Local Law 2016*, 14 September 2017; Report 4, *Report in relation to the City of Gosnells Waste Local Law 2016 and the Shire of Chittering Waste Local Law 2017*, 2 November 2017; Report 5, *Legal Profession (Law Library Fees) Rules 2017*, 7 November 2017 (however, note that the Committee did not make a formal recommendation for disallowance in this report); and Report 6, *Town of East Fremantle Plastic Bag Reduction Local Law 2017*, 30 November 2017.

¹⁴ *Town of Cambridge Local Government and Public Property Local Law 2016*, *City of Gosnells Waste Local Law 2016*, *Shire of Chittering Waste Local Law 2017*, *Legal Profession (Law Library Fees) Rules 2017* (however, note that the Committee did not make a formal recommendation for disallowance in relation to this instrument) and *Town of East Fremantle Plastic Bag Reduction Local Law 2017*.

- Report 1—Observations arising from the Committee review of the *City of Joondalup Local Government and Public Property Amendment Local Law 2015*, tabled on 14 September 2017.
- Report 2—*Town of Cambridge Local Government and Public Property Local Law 2016*, tabled on 14 September 2017.
- Report 3—Procedures for dealing with consequential amendments to delegated legislation following enactment of primary legislation, tabled on 12 October 2017.
- Report 4—Report in relation to the *City of Gosnells Waste Local Law 2016* and the *Shire of Chittering Waste Local Law 2017*, tabled on 2 November 2017.
- Report 5—*Legal Profession (Law Library Fees) Rules 2017*, tabled on 7 November 2017.
- Report 6—*Town of East Fremantle Plastic Bag Reduction Local Law 2017*, tabled on 30 November 2017.

2.3 These reports can be viewed at <www.parliament.wa.gov.au/del> by choosing 'REPORTS'.

Undertakings

2.4 During the reporting period, the Committee received four departmental and 30 local government undertakings. The lists of undertakings can be viewed at <www.parliament.wa.gov.au/del> by scrolling down to 'Undertakings provided to the Committee'.

Circulars relating to explanatory memoranda

2.5 Two government circulars direct delegated legislation makers to provide the Committee with the explanatory material that it requires to perform its role—the:

- Premier's Circular No. 2014/01, *Subsidiary legislation—explanatory memoranda*, directed at State government departments and agencies.
- Ministerial Circular No. 04-2010, *Local Laws Explanatory Memoranda Directions 2010*, directed at local governments.

2.6 These circulars also set out:

- the detail of the information which is to be provided
- the deadline for the provision of explanatory memoranda
- the format in which the various material is to be provided.

2.7 The Department of the Premier and Cabinet and the DLGSC are currently reviewing their respective circulars and sought suggestions for improvements from the Committee. The Committee provided its suggestions in October 2017¹⁵ and has maintained an open dialogue with the departments in order to ensure that the reviews are meaningful and effective. The Committee looks forward to the updated circulars being re-issued in 2018.

¹⁵ For example, the recommendation in the Committee's Report 3 was incorporated into the suggestions sent to the Department of the Premier and Cabinet: see 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 3, *Procedures for dealing with consequential amendments to delegated legislation following enactment of primary legislation*, 12 October 2017, p 3.

Sessional resolution 12

2.8 Sessional resolutions are internal work practices adopted by parliamentary committees. They are not usually published. The Committee resolved to publish sessional resolution number 12 to advise the Parliament and the general public:

- of the range of final decisions at the Committee's disposal in relation to instruments of delegated legislation
- about the types of Committee decisions which may be disclosed.

2.9 The resolution provides as follows:

Privacy—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
- accept an undertaking (including the provision of the details of the undertaking)
- 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
- discharge a 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.

Local Laws Working Group meeting

2.10 The Local Laws Working Group (Working Group) is hosted by the DLGSC and comprises representatives from:

- the Office of the Minister for Local Government
- WALGA
- the Department of Health (DoH)
- the Department of Water and Environmental Regulation (DWER)
- the Department of Treasury
- Committee Members and staff.

2.11 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 meeting is an annual event. In 2017, it took place on 14 November.

2.12 The meetings continue to provide a useful forum 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.

Health local laws update

- 2.13 The Committee's annual reports for 2014, 2015 and 2016 discussed the Public Health Bill 2014 and the ramifications of its enactment for instruments of delegated legislation in that sector. The resulting *Public Health Act 2016* and the *Public Health (Consequential Provisions) Act 2016* each received Royal Assent on 25 July 2016, but have not fully commenced operation.
- 2.14 In 2016, the Committee highlighted that, depending on the matters covered by regulations made under the above Acts, it may be necessary for some residual public health matters to be dealt with in health local laws. In March 2016, the Minister for Health advised the Committee that a model local law may be developed to assist local governments with that process.¹⁶
- 2.15 At the 2017 Working Group meeting, WALGA indicated that, because the content of a health model local law would depend on the matters contained in the public health regulations, a model would not be prepared until the regulations are in place. The DoH advised that most local governments were postponing the making of new health local laws in the meantime.
- 2.16 For more information about the ramifications of the *Public Health Act 2016* and the *Public Health (Consequential Provisions) Act 2016* for local governments wishing to make health local laws, refer to paragraphs 4.15–4.18.

3 Issues relating to regulations and rules

Abrogation of fundamental common law principles

- 3.1 There is a general presumption (the principle of legality) that legislation does not override what are seen to be fundamental common law principles unless the words of the legislation clearly state an intent to do so. The principle of legality applies to the interpretation of all legislation and has been described as follows:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.

General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.¹⁷

- 3.2 In the context of delegated legislation, an instrument must not erode fundamental common law principles unless that erosion is explicitly authorised or necessarily implied by the empowering Act.¹⁸ A significant line of High Court of Australia cases since 1908 has established that an Act of Parliament is needed to overturn important common law principles.¹⁹

¹⁶ 39th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 89, *Annual report 2016*, 16 November 2016, p 19.

¹⁷ *Coco v R* (1994) 179 CLR 427 at p 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

¹⁸ Dan Meagher and Matthew Groves, 'The common law principle of legality and secondary legislation', *UNSW Law Journal*, 2016, vol. 39, issue no. 2, p 450 at pp 451 and 486.

¹⁹ This principle can be traced from *Potter v Minahan* (1908) 7 CLR 277. An example of a more recent High Court case is *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 per Gageler and Keane JJ at paragraphs 312–13.

- 3.3 Both of the instruments discussed under this heading tested the width of the regulation-making power in their respective enabling Acts. In these two instruments, the power was being used by the Executive Government to abrogate the common law.

Electricity (Licensing) Amendment Regulations 2017

- 3.4 The Committee was concerned about amendments made by this instrument which had the effect of removing the element of knowledge from a number of offences. For example, a newly inserted provision provided that an offence is committed if an electrical contractor makes a record 'that is false or misleading'.²⁰ Previously, that offence was committed if the electrical contractor made a record that he or she 'knows to be false or misleading' (underlining added). The amendment created what is known as a 'strict liability'²¹ offence.
- 3.5 This was just one of a number of similar amendments made by the instrument. The changes were justified on the grounds that knowledge that something is false or misleading 'is difficult to prove beyond a reasonable doubt'.²²
- 3.6 The Committee pays close attention to instruments which create strict liability offences or offences without a defence of reasonable excuse. This is because there is a fundamental common law principle that:
- presumes 'mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence'.²³
- 3.7 In considering an instrument, the Committee must determine whether it is 'within power'²⁴—that is, whether the instrument is authorised by the empowering Act. Applying the principle of legality to this context, if the Parliament had intended to authorise the creation of strict liability offences by regulation, it would have used specific, unmistakable and unambiguous words to that effect in the empowering section.
- 3.8 The empowering section for the amendments was section 32(3)(g) of the *Electricity Act 1945*, which authorised the creation of offences by regulation:
- Without prejudice to the generality of subsection (1) or subsection (2), such regulations may —
- (g) create offences, and provide for the payment, enforcement and recovery of penalties, fees and charges;
- 3.9 There is no express power in that section to impose strict liability offences. The Committee considered that the Parliament, when enacting section 32(3)(g), did not authorise the making of regulations which erode the presumption against strict liability offences.
- 3.10 The Committee was aware that section 36 of *The Criminal Code* provides for the defences set out in Chapter V of the Code to apply to charges brought under all written law, including delegated legislation. However, the Committee was concerned by the deliberate omission of

²⁰ Regulation 1.5(2) of the *Electricity (Licensing) Amendment Regulations 2017* inserted regulation 52(2AB) of the *Electricity (Licensing) Regulations 1991*.

²¹ 'liability regardless of fault': Macquarie Dictionary, 2018, Macmillan Publishers Australia, Sydney, viewed 14 February 2018, <https://www.macquariedictionary.com.au/features/word/search/?word=strict+liability&search_word_type=Dictionary>.

²² *Electricity (Licensing) Amendment Regulations 2017, Explanatory Memorandum*, Legislative Council, Attachment A, pp 2 and 3.

²³ Australian Law Reform Commission, Report 129, *Traditional rights and freedoms—encroachments by commonwealth laws*, Australian Government, Sydney, December 2015, p 286, paragraph 10.10 quoting *Sherras v De Rutzo* [1895] 1QB 918 at p 921.

²⁴ Committee Term of Reference 10.6(a): *Standing Orders of the Legislative Council* Schedule 1, cl 10.6(a).

the element of knowledge from the offence provisions in the principal regulations and wrote to the Minister for Commerce and Industrial Relations requesting his views on the matter.

3.11 The Committee must also consider whether an instrument 'contains only matter that is appropriate for subsidiary legislation'.²⁵ Some matters may be of such gravity or seriousness as to warrant full parliamentary debate, through the introduction of primary legislation. In its letter to the Minister, the Committee also expressed the view that the problematic provisions of the instrument may fall into the category of measures which should be in primary legislation.

3.12 In response, the Minister explained that the Government had been advised against prosecuting the relevant offences under the previous version of the principal regulations because:

it is extremely difficult to prove the state of mind of the alleged offender at the time the alleged offence was committed.²⁶

3.13 Once the strict liability offences were in place, it was intended that a defendant would rely on a 'mistake of fact'²⁷ as a possible defence against the charge.²⁸ However, the Minister noted the Committee's concerns and proposed the further amendment of the principal regulations to replace the current phrase with the words 'knows, or ought reasonably to know, to be false or misleading'. The Minister explained that this change:

would remove the strict liability concern expressed by the Committee while retaining the onus of proof on the prosecution to show that the alleged offender did not have appropriate systems in place to avoid making a mistaken view.²⁹

3.14 In the meantime, the Government would not initiate proceedings against any person to whom the current principal regulations might apply.³⁰ The Committee accepted the proposal.

Road Traffic Regulations Amendment (Pilot Vehicle Drivers) Regulations 2016

3.15 In the Committee's view, new regulation 454P of the *Road Traffic (Vehicles) Regulations 2014*³¹ abrogates the common law principle known as the presumption of innocence. The Australian Law Reform Commission has described the importance of the presumption of innocence principle in Australian law:

The presumption of innocence has been recognised since 'at latest, the early 19th Century'. In 1935, the House of Lords said the presumption of innocence principle was so ironclad that 'no attempt to whittle it down can be entertained'. In 2005, the House of Lords said that the underlying rationale for the presumption of innocence is that to place the burden of proof on a defendant is 'repugnant to ordinary notions of fairness'.³²

3.16 The effect of new regulation 454P was that a holder of a heavy vehicle pilot licence may have their licence suspended or cancelled if they conduct themselves in a manner which gives rise to the grounds in regulation 454P(a) or (b)(ii). Crucially, this suspension or cancellation could

²⁵ Committee Term of Reference 10.6(d): *ibid*, Schedule 1, cl 10.6(d).

²⁶ Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations, Letter, 5 September 2017, p 1.

²⁷ See section 24 of *The Criminal Code*, which appears in Chapter V of the Code.

²⁸ Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations, Letter, 5 September 2017, p 1.

²⁹ *ibid*, p 2.

³⁰ *ibid*.

³¹ Inserted by regulation 5 of the *Road Traffic Regulations Amendment (Pilot Vehicle Drivers) Regulations 2016*.

³² Australian Law Reform Commission, Report 129, *Traditional rights and freedoms—encroachments by commonwealth laws*, Australian Government, Sydney, December 2015, p 260.

occur in the absence of a conviction or a nomination of guilt. This is the case for even minor traffic breaches.³³

3.17 The Committee wrote to the Minister for Transport about new regulation 454P, which provides as follows:

454P. Grounds for suspending or cancelling

For the purposes of this Subdivision³⁴, the following are grounds to suspend or cancel a heavy vehicle pilot licence —

(a) the holder is charged in this State or elsewhere with a relevant offence;

(b) the holder —

(i) has not complied with the licence; or

(ii) has not complied with a road law; or

... (underlining added)

3.18 The term 'relevant offence' is defined in new regulation 454A as meaning:

any of the following —

(a) an offence against a road law;³⁵

(b) an offence against a law of another place that substantially corresponds to an offence against a road law; (underlining added)

3.19 The Committee considers whether an instrument is authorised by its empowering Act.³⁶ Sections 132(1)³⁷ and (2)(h)³⁸ of the *Road Traffic (Vehicles) Act 2012* and section 143(1) of the *Road Traffic (Administration) Act 2008*³⁹ were the empowering provisions for regulations 454P(a) and (b)(ii). Applying the principle of legality to this context, none of those provisions contain words which specifically, unmistakably and unambiguously overturn the presumption of innocence principle.

3.20 Accordingly, the Committee was of the view that the regulations in question were not authorised by the empowering Acts and therefore breached the Committee's Term of Reference 10.6(a)—that is, the regulations were not 'within power'.

3.21 The Committee also raised the possibility that the regulations in question breached its Term of Reference 10.6(b).

³³ For example, a driver accused of speeding no more than 9 km/h over the speed limit and consequentially incurring a \$100 fine: *Road Traffic Code 2000* regs 11 and 17(1). The driver, on receiving an infringement notice, has the right to contest the matter and have the matter heard before a court of summary jurisdiction. The *Road Traffic Code 2000* comes within the definition of 'road law' because it is delegated legislation made under the *Road Traffic Act 1974*.

³⁴ Entitled '*Suspending and cancelling heavy vehicle pilot licence*'.

³⁵ '**road law** means any of the following enactments — (a) this Act; (b) the *Road Traffic Act 1974*; (c) the *Road Traffic (Authorisation to Drive) Act 2008*; (d) the *Road Traffic (Vehicles) Act 2012*': *Road Traffic (Administration) Act 2008* s 4. The *Road Traffic (Administration) Act 2008* was one of the instrument's empowering Acts.

³⁶ Committee Term of Reference 10.6(a): *Standing Orders of the Legislative Council* Schedule 1, cl 10.6(a).

³⁷ 'The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.'

³⁸ 'Without limiting subsection (1), regulations may — provide for matters relating to vehicles that are used to warn other road users of the presence of other vehicles'.

³⁹ 'The Governor may make regulations prescribing any matter that is required or permitted by this Act to be prescribed, or that is necessary or convenient to be prescribed for giving effect to the purposes of this Act.'

- 3.22 Following correspondence with the Committee, the Minister accepted that regulations 454P(a) and (b)(ii) were not authorised by the empowering Acts and undertook to delete them as soon as possible.⁴⁰

Court fees

- 3.23 Fees charged by the courts and tribunals in Western Australia are imposed by instruments of delegated legislation made by each institution. The previous Committee found that the courts and tribunals cost their fees at a 'whole of court or tribunal level' rather than at the individual fee level.⁴¹ This was frustrating the Committee's scrutiny of court and tribunal fees, which prompted the Committee to make the following recommendations:

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Recommendation 1: The Committee recommends that the Department of the Attorney General provide Explanatory Memoranda showing percentages of cost recovery achieved where an activity associated with a fee in each court or tribunal is sufficiently identifiable and quantifiable.

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Recommendation 2: The Committee recommends that the Department of Treasury identify those agencies that lack homogeneous services to the Department of the Attorney General. The Committee further recommends that the Department of the Attorney General then engage in a dialogue with those identified agencies as to how they cost such services.

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Recommendation 3: The Committee recommends that the Department of the Attorney General request assistance from the Department of Treasury to begin the development of a 'fee for service' cost-demand model for court and tribunal fees.

- 3.24 The Government responded to these recommendations as follows:
- The Government supported recommendation 1.⁴²
 - The Government took steps to implement recommendation 2. After finding no agencies which 'lack homogenous services', and for other stated reasons, the Government advised that it would take no further action in this respect.⁴³
 - Regarding recommendation 3, the Government was of the view that the existing costing models were sufficiently robust and that implementing the recommendation would be prohibitively expensive and burdensome. However:

as has occurred historically, action will be taken to improve the costing model for court and tribunal fees on an annual basis and the Department of the Attorney General will seek the advice and assistance of the Department of Treasury as part of that process as appropriate.⁴⁴

⁴⁰ Hon Rita Saffioti MLA, Minister for Transport, Letter, 15 September 2017, p 1.

⁴¹ 39th 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, p 19, Finding 1.

⁴² Hon Michael Mischin MLC, Attorney General, Letter, 20 November 2014, p 1.

⁴³ *ibid.*

⁴⁴ *ibid.*, p 2.

- 3.25 In 2017, the Committee was pleased to note that the explanatory memoranda supplied by the courts and tribunals indicated that they have started to cost individual fees. The Committee remains alert to this issue and will maintain a watching brief over these types of fees.

4 Issues relating to local laws

Committee hearing

- 4.1 While the Committee has the power to 'send for persons, papers and records',⁴⁵ it is rare for the Committee to hold hearings. On one occasion in 2017, the Committee resorted to requesting the attendance of local government representatives at a private hearing to resolve a procedural issue. This was after the Committee had already requested a written explanation and received a tardy and inadequate response.
- 4.2 The DLGSC first alerted the Committee to the procedural issue in a timely manner. The information supplied by the DLGSC in this matter allowed the Committee to resolve the issue to the Committee's satisfaction. This was an example of the collaboration which exists between the two offices and the Committee commends the staff at the DLGSC for their vigilance.

Committee consideration of section 3.12(2A) of the LGA

- 4.3 Sections 3.12(1) and (2A) of the *Local Government Act 1995* (LGA) provide that:

3.12. Procedure for making local laws

- (1) In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.
- (2A) Despite subsection (1), a failure to follow the procedure described in this section does not invalidate a local law if there has been substantial compliance with the procedure. (underlining added)

- 4.4 In its *Annual report 2016*, the Committee outlined a brief history of new subsection (2A).⁴⁶ The subsection was designed to avoid the invalidation of local laws due to minor deviations from the otherwise strict procedural requirements in the remainder of section 3.12 (see Appendix 1 for the full section).
- 4.5 The new subsection has been operating for over 12 months,⁴⁷ and the Committee can now provide some examples of when it has and has not relied upon the subsection to excuse procedural defects in the making of local laws.
- 4.6 Each instrument is considered on its own facts as to whether 'substantial compliance' with the procedure was achieved. As a general approach, the Committee is unlikely to excuse procedural defects which frustrate the purpose of section 3.12; for example, where the error prevents public or departmental scrutiny of a proposed local law.

⁴⁵ *Standing Orders of the Legislative Council* Standing Order 166(a).

⁴⁶ 39th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 89, *Annual report 2016*, 16 November 2016, pp 13–15.

⁴⁷ Section 3.12(2A) commenced operating on 12 November 2016.

Examples of occasions when section 3.12(2A) was applied

Town of Cambridge—Private Property Local Law 2016, Trading in Public Places Local Law 2016 and Waste Local Law 2016

- 4.7 In these cases, section 3.12(3) was not followed sequentially. Under section 3.12(3), local governments must:
- give state-wide and local public notice proposing to make a local law⁴⁸
 - then, 'as soon as' the public notices have been given, provide a copy of the proposed local law and a copy of the notices to the relevant Minister(s).⁴⁹
- 4.8 The Town notified the Minister for Local Government (step two) between two and nine days before it gave state-wide public notice (step one) of the proposed local laws. The Committee concluded that the Town had completed both steps contemporaneously and had therefore substantially complied with the section 3.12 procedure.

Examples of occasions when section 3.12(2A) did not apply

Town of Cambridge Local Government and Public Property Local Law 2016

- 4.9 This local law was dealt with in Committee Report 2.⁵⁰ It purported to apply to places outside of the Town's district, between its coastal boundary and 200 metres into the sea. Prior to making the local law, the Town had not obtained the Governor's approval for making a local law applying outside its district. This pre-approval is required under section 3.6(1) of the LGA.
- 4.10 The Committee found that section 3.12(2A) did not apply because the procedure in question was a requirement of section 3.6, not section 3.12.

City of Gosnells Waste Local Law 2016 and Shire of Chittering Waste Local Law 2017

- 4.11 These two waste local laws were discussed in Committee Report 4.⁵¹ The local governments were required by the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) to obtain the consent of the DWER's CEO prior to making the local laws.⁵² This prior consent was not obtained by either local government, rendering the local laws invalid.
- 4.12 Section 3.12(2A) did not apply because the procedures in question were requirements of the WARR Act, not the LGA.

⁴⁸ Section 3.12(3)(a).

⁴⁹ Section 3.12(3)(b).

⁵⁰ 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 2, *Town of Cambridge Local Government and Public Property Local Law 2016*, 14 September 2017. Pursuant to the Committee's recommendation, the Legislative Council disallowed this local law on 9 November 2017.

⁵¹ 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 4, *Report in relation to the City of Gosnells Waste Local Law 2016 and the Shire of Chittering Waste Local Law 2017*, 2 November 2017. Pursuant to the Committee's recommendation, the Legislative Council disallowed these local laws on 9 November 2017.

⁵² Required under the WARR Act s 61(1) (see paragraph 4.32).

Town of East Fremantle Plastic Bag Reduction Local Law 2017

- 4.13 This instrument was the subject of Committee Report 6.⁵³ The instrument was made invalidly because it was 'significantly different from what was proposed.'⁵⁴ The Committee found that the Town breached:
- section 3.12(4) of the LGA by making a 'significantly different' local law
 - section 3.13 of the LGA by failing to recommence the local law-making process.⁵⁵
- 4.14 The Committee did not apply section 3.12(2A) for the following reasons:
- Section 3.12(4) is a vital step in the local law-making procedure. It is not possible to 'substantially comply' with the procedure if the local law is not made in accordance with section 3.12(4).
 - Section 3.12(2A) cannot be used to rectify a breach of section 3.13 because it only pertains to deficiencies in the local law-making procedures prescribed in section 3.12.⁵⁶

Health local laws made under the LGA

- 4.15 Health local laws have historically been made under section 342 of the *Health Act 1911* (now called the *Health (Miscellaneous Provisions) Act 1911*). In 2017, the Committee scrutinised the first health local law made pursuant to the section 3.5 of the LGA,⁵⁷ as a result of the public health reforms discussed at paragraphs 2.13–2.16.
- 4.16 Health local laws made under the LGA (unlike those made under the *Health (Miscellaneous Provisions) Act 1911*) do not require the consent of the Chief Health Officer.⁵⁸ The authority to make health local laws under the LGA arises from the new section 3.5(4B):⁵⁹
- Nothing in the *Health (Miscellaneous Provisions) Act 1911* or the *Public Health Act 2016* prevents a local government from making local laws under this Act [the LGA] about matters relating to public health (as defined in the *Public Health Act 2016* section 4(1)).⁶⁰
- 4.17 The transition to the full implementation of the *Public Health Act 2016* is occurring over five stages, with progress now at stage three.⁶¹ The DoH advised that, during stages three–five, the transition phase, local governments have the following two options for creating health local laws:

⁵³ 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 6, *Town of East Fremantle Plastic Bag Reduction Local Law 2017*, 30 November 2017. Pursuant to the Committee's recommendation, the Legislative Council disallowed this local law on 6 December 2017.

⁵⁴ See LGA s 3.12(4).

⁵⁵ Refer to Appendix 1 for a reproduction of both sections.

⁵⁶ 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 6, *Town of East Fremantle Plastic Bag Reduction Local Law 2017*, 30 November 2017, pp 9–10.

⁵⁷ *Shire of Chittering Health Local Law 2017*

⁵⁸ Formerly known as the Executive Director, Public Health.

⁵⁹ Inserted on 24 January 2017 consequential upon the enactment of the *Public Health Act 2016*.

⁶⁰ Section 4(1) of the *Public Health Act 2016* defines 'public health' as meaning 'the health of individuals in the context of—(a) the wider health and wellbeing of the community; and (b) the combination of safeguards, policies and programmes designed to protect, maintain, promote and improve the health of individuals and their communities and to prevent and reduce the incidence of illness and disability'.

⁶¹ Department of Health, Government of Western Australia, Perth, viewed 21 February 2018, <<http://ww2.health.wa.gov.au/Improving-WA-Health/Public-health/Public-Health-Act/Preparing-local-government-enforcement-agencies/Public-Health-Act-Toolkit-for-Local-Government/Local-laws>>.

1. The Local Government Act 1995 which does not require consent from the CHO [Chief Health Officer]. ... or
2. Section 342 of the Health (Miscellaneous Provisions) Act 1911 which does require consent.

The DOH is advising local government of both of these options, with most opting for option 1.

Section 342 will remain in the Health (Miscellaneous Provisions) Act 1911 during stages 3 to 5 of implementation of the Public Health Act 2016. After stage 5 of implementation, section 342 will be repealed, and all previous local laws may need to be reviewed and possibly repealed and replaced.⁶²

- 4.18 According to the DoH, stage five of the transition phase is expected to be completed within the next three–five years. More information can be found on the DoH website.⁶³

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

- 4.19 In 2015, the Committee noted that some health local laws required the buffer distance between a non-intensive piggery and an isolated rural dwelling, dairy or industry to be significantly larger than that required for an intensive piggery.⁶⁴ The Committee alerted the Ministers for Health and Local Government to this anomaly, following which it was proposed that affected local laws be amended by a Governor’s amendment local law pursuant to section 3.17 of the LGA.
- 4.20 The Committee was later advised that a Governor’s global amendment would have required a Consultation Regulation Impact Statement, leading to ‘significant delays’ and ‘considerable expense’ for the DoH. Instead, individual local governments with the buffer distance anomaly in their health local laws would be notified by the DoH and advised to amend their laws.⁶⁵

Omission of objection and appeal rights clause in waste local laws

- 4.21 A number of waste local laws made in 2016–2017 relied on an incorrect WALGA template waste local law which did not contain an ‘Objections and appeal rights’ clause.⁶⁶ In 2014, the previous Committee inquired into and approved a proposed WALGA template waste local law containing the following clause:

5.1 Objection and appeal rights

Division 1 of Part 9 of the LG Act applies to a decision under this local law to grant, renew, vary or cancel—

⁶² Bree Abbott, Senior Policy Officer, Environmental Health Directorate, Public Health Division, Department of Health, Email, 19 April 2017.

⁶³ Department of Health, Government of Western Australia, viewed 21 February 2018, <<http://ww2.health.wa.gov.au/Improving-WA-Health/Public-health/Public-Health-Act/Preparing-local-government-enforcement-agencies/Public-Health-Act-Toolkit-for-Local-Government/Local-laws>>.

⁶⁴ 39th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 83, *Annual report 2015*, 18 February 2016, pp 13–14.

⁶⁵ Hon John Day MLA, Minister for Health, Letter, 30 December 2016, p 1.

⁶⁶ For example, the *Town of Cambridge Waste Local Law 2016*, *Shire of Gingin Waste Local Law 2016*, *Shire of Capel Waste Local Law 2016*, *Shire of Murray Waste Local Law 2016*, *Shire of Moora Waste Local Law 2016*, *Town of East Fremantle Waste Local Law 2017*, *City of Nedlands Waste Local Law 2016*, *Shire of Donnybrook-Balingup Waste Local Law 2017*, *City of Busselton Waste Local Law 2016* and *City of South Perth Waste Local Law 2017*.

- (a) an approval under clause 2.7(b);
- (b) an exemption under clause 2.8(2);
- (c) an approval under clause 2.10(1);
- (d) an authorisation under clause 3.2(1)(c);
- (e) an approval under clause 3.2(2); and
- (f) an approval under clause 3.3.

- 4.22 At some point following the previous Committee's inquiry, WALGA inadvertently uploaded to its website an earlier version of the template which omitted clause 5.1. This was immediately corrected by WALGA when notified by the Committee, but a number of local governments has already relied on the incorrect template.
- 4.23 The Committee's Term of Reference 10.6(c) states that the Committee is to inquire whether an instrument 'provides an effective mechanism for the review of administrative decisions'.⁶⁷
- 4.24 Part 9, Division 1 of the LGA⁶⁸ prescribes objection and review rights and applies to any decision made by a local government. However, the Committee has historically preferred that such rights be expressly provided for in the body of a local law so that they are highly visible and therefore more effective. This is particularly the case in relation to waste local laws given the previous Committee's approval of the proposed template containing the 'objections and appeal rights' clause.
- 4.25 The Committee wrote to the affected local governments, sought and obtained written undertakings from their councils that an 'objections and appeal rights' clause would be inserted within six months.⁶⁹
- 4.26 During this process, the Committee detected an omission in clause 5.1 of the template—it failed to make reference to the power in clause 2.9(b) to authorise a person to remove certain receptacles. Committee staff notified WALGA of the issue and clause 5.1 has since been amended to include a reference to clause 2.9(b).

Absence of DWER consent to waste-related provisions in some nuisance and health local laws

- 4.27 Some 'animals, environment and nuisance' local laws and health local laws considered by the Committee in 2017 contained provisions dealing with the management and disposal of waste. The WARR Act requires local governments to obtain the consent of the CEO of the DWER⁷⁰ prior to making local laws dealing with specified matters relating to waste.⁷¹
- 4.28 After consideration, the Committee formed the view that the affected clauses of the animals, environment and nuisance local laws and health local laws:
- did not come within section 64(2) of the WARR Act
 - consequently, did not require the consent of the DWER's CEO.

⁶⁷ Committee Term of Reference 10.6(c): *Standing Orders of the Legislative Council* Schedule 1, cl 10.6(c).

⁶⁸ Entitled '*Objections and review*'.

⁶⁹ The Committee took the view that, given the previous Committee's participation in developing the template, it would be inappropriate for clause 5.1 to remain omitted until each local law was next reviewed (which may not occur for another eight years).

⁷⁰ Previously, the Department of Environment Regulation.

⁷¹ Sections 61 and 64 of the WARR Act. See paragraphs 4.32 and 4.33.

- 4.29 The Minister for Environment later agreed with this view.⁷² The Committee's reasons for this view are discussed below.
- 4.30 This issue was first raised for local laws made by the Shire of Cunderdin.⁷³ The DWER told the Shire that there were 'reasonable grounds' to require the consent of its CEO to the waste-related provisions.⁷⁴
- 4.31 The DWER later advised the Committee that:
- its advice that the above provisions may require consent was not a concluded view, and simply highlighted that there were 'reasonable grounds'
 - it was reviewing the appropriate extent of the CEO's role in providing consent to waste local laws.
- 4.32 Section 61(1) of the WARR Act provides:
- 61. Local laws in respect of waste management**
- (1) A local government —
- (a) may, if the CEO consents; and
- (b) must, if the CEO so directs,
- make local laws in accordance with the Local Government Act 1995 Part 3 Division 2 Subdivision 2 for the purposes specified in section 64 or generally for carrying into effect the provisions of this Part.⁷⁵
- 4.33 Section 64(2) of the WARR Act provides that local laws may be made for various purposes, including:
- (a) the provision and administration of waste services and related matters;
- (b) the establishment, provision, use and control of receptacles for the deposit and collection of waste, whether temporary or otherwise;**
- (c) if a local government itself undertakes or contracts for removal of waste from premises, imposing on the owner or occupier of the premises requirements in connection with the removal so as to facilitate the removal, and prescribing the manner in which the requirement is to be complied with;
- (d) if a local government or the holder of a waste collection permit does not itself undertake or contract for removal of waste from premises, imposing on the owner or occupier of the premises a requirement to remove waste from the premises, and prescribing the manner in which the requirement is to be complied with;**
- ... (bolding added)
- 4.34 The affected health local law provisions related to:

⁷² Hon Stephen Dawson MLC, Minister for Environment, Letter, 17 July 2017, p 1.

⁷³ *The Shire of Cunderdin Animals, Environment and Nuisance Local Law 2016* and the *Shire of Cunderdin Health Local Law 2016*.

⁷⁴ Jason Banks, Director General, then Department of Environment Regulation, Letter to Shire of Cunderdin, 15 August 2016, p 1.

⁷⁵ 'This Part' refers to Part 6, which deals with 'waste services' which is defined to mean '(a) the collection, transport, storage, treatment, processing, sorting, recycling or disposal of waste; (b) the provision of receptacles for the temporary deposit of waste; or (c) the provision and management of waste facilities, machinery for the disposal of waste and processes for dealing with waste'.

- measures to be taken by an occupier in relation to the maintenance of rubbish receptacles so as to minimise flies
- the provision and emptying of receptacles in relation to offensive trades
- the duties of an occupier of fish premises in relation to storage and disposal of fish waste.

4.35 The affected animals, environment and nuisance local law provisions related to:

- the management and removal of refuse on building sites
- the removal of refuse and disused materials from 'unsightly land'.⁷⁶

4.36 All of the affected local laws were expressed to be made under the *Heath Act 1911*, LGA and 'all other powers enabling' them. Section 43(2) of the *Interpretation Act 1984* provides:

Where any subsidiary legislation purports to be made in exercise of a particular power or powers, it shall be deemed also to be made in exercise of all powers under which it may be made.

4.37 Accordingly, if a local law falls within the purposes specified in section 64(2) of the WARR Act, it is deemed to be made under section 61(1) of that Act, and the LGA. As such, the local law would require the consent of the CEO.

4.38 In this case, the relevant parts of section 64(2) were paragraphs (b) and (d). In determining the scope of these powers, the Committee took the view that they must be read:

- in the context of section 64(2) as a whole
- also in the context of the other provisions of Part 6 of the WARR Act.

Section 64(2)(b) of the WARR Act

4.39 This section applies to 'the establishment, provision, use and control of receptacles **for the deposit and collection** of waste, whether temporary or otherwise' (bolding added). The terms 'collect' and 'collection' are not defined in the WARR Act but are used frequently throughout Part 6 of the Act, primarily in the context of 'waste collection permits'.

4.40 The Committee determined that, in the context of their usage in the WARR Act,⁷⁷ the words 'collect' and 'collection' mean 'to fetch; call for and remove'.⁷⁸ Consistent with this approach, the WALGA template waste local law⁷⁹ contains the following definition of 'collection':

collection, when used in relation to a receptacle, means the collection and removal of collectable waste from the receptacle by the local government or its contractor.⁸⁰

4.41 Therefore, the reference to 'receptacles for the deposit and collection of waste' in section 64(2)(b) means receptacles for the purposes of waste collection from premises. It does not

⁷⁶ Examples of the provisions can be seen in clauses 3.1, 3.2 and 3.7 of the [Shire of Corrigin Animals, Environment and Nuisance Local Law 2016](#), and clauses 6.3, 9.14, 9.20 and 9.21 of the [Shire of Corrigin Health Local Law 2016](#). Other affected local laws had different clause numbers.

⁷⁷ See, for example, the use of 'collect' and 'collection' in sections 56(1), 64(2)(g) and 69.

⁷⁸ Macquarie Dictionary, 2018, Macmillan Publishers Australia, Sydney, viewed 26 February 2018, <https://www.macquariedictionary.com.au/features/word/search/?word=collect&search_word_type=Dictionary>.

⁷⁹ Inquired into in draft by the previous Committee: 39th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 77, *Inquiry into a Proposed Template Waste Local Law*, 27 November 2014.

⁸⁰ Cl 1.5(1).

include receptacles for the temporary storage of waste prior to its removal by the owner or occupier, such as a kitchen rubbish bin.⁸¹

Section 64(2)(d) of the WARR Act

4.42 In the Committee's view, sections 64(2)(c) and (d) must be read together. They empower the making of local laws in the following two alternative circumstances:

- Subsection (c): where a local government itself undertakes removal of waste from a premises or contracts that removal to a third party, local laws may be made imposing requirements in connection with that removal (for example, where and when 'wheelie' bins must be placed for collection).
- Subsection (d): where a local government does not itself undertake removal of waste from a premises or contract that removal to a third party, local laws may be made:

imposing on the owner or occupier of the premises a requirement to remove waste from the premises, and prescribing the manner in which the requirement is to be complied with;

4.43 The Committee's interpretation of section 64(2)(d) is that it empowers local laws imposing requirements for the *regular* removal of waste where a service is not provided by the local government or its contractor. It does not apply to local laws imposing or enabling the imposition of *ad hoc* requirements to remove waste from premises from time to time.⁸²

4.44 Therefore, the Committee's view was that the affected clauses did not come within the WARR Act and did not require the consent of the DWER's CEO.

Disposal of disused refrigerators in animals, environment and nuisance local laws

4.45 The Committee noted numerous local laws⁸³ which regulated the disposal of disused refrigerators by the following clause, or similar:

3.9 Disposing of disused refrigerators or similar containers

A person shall not place, leave or dispose of a disused refrigerator, ice chest, ice box, trunk, chest or other similar article having a compartment which has a capacity of 0.04 cubic metres or more on any land without first—

- (a) removing every door and lid and every lock, catch and hinge attached to a door or lid; or
- (b) rendering every door and lid incapable of being fastened; and

⁸¹ The Committee noted some ambiguity in section 64(2), in that some paragraphs use the word 'removal' in place of 'collection'. For example, paragraphs (c) and (d) refer to a local government undertaking or contracting 'for removal of waste from premises'. The use of the term 'removal' instead of 'collection' suggests there is a difference between the two. This ambiguity is unhelpful and confusing but does not alter the preferred meaning of the term 'collect' in the WARR Act—'to fetch; call for and remove'.

⁸² Such as, for example, clause 3.7(2) of the [Shire of Corrigin Animals, Environment and Nuisance Local Law 2016](#).

⁸³ For example, the *Shire of Corrigin Animals, Environment and Nuisance Local Law 2016*, *Shire of Lake Grace Animals, Environment and Nuisance Local Law 2016*, *Shire of Cunderdin Animals, Environment and Nuisance Local Law 2016*, *Shire of Bruce Rock Animals, Environment and Nuisance Local Law 2016*, *Shire of Narembeen Animals, Environment and Nuisance Local Law 2016*, *Shire of Donnybrook-Balingup Animals, Environment and Nuisance Local Law 2017*, *Shire of Kulin Animals, Environment and Nuisance Local Law 2016* and *Shire of Kondinin Animals, Environment and Nuisance Local Law 2016*.

- (c) removing any refrigerants as per requirements of the *Environment Protection (Ozone Protection) Policy 2000*.

- 4.46 The clause incorrectly cited the obsolete *Environmental Protection (Ozone Protection) Policy 2000*. Approval of the policy was revoked by the Minister for Environment on 1 September 2009,⁸⁴ when the Commonwealth assumed control over ozone protection and subsequently drafted regulations on this subject matter.⁸⁵
- 4.47 Undertakings were obtained from the affected local governments to delete subclause (c) or its equivalent, and the DLGSC was notified of the issue.

Insertion of a definition of 'nuisance' in waste local laws

- 4.48 In 2017, two waste local laws contained a definition of 'nuisance'. The term is not defined in the WALGA waste local law template although it is used twice.⁸⁶
- 4.49 When the previous Committee inquired into the proposed WALGA template waste local law, the issue of whether a definition of 'nuisance' should be included was raised, and the Committee accepted WALGA's view that, based on its legal advice, 'nuisance', as a legal term, should not be defined.⁸⁷
- 4.50 The two local laws defined 'nuisance' as follows:
 - nuisance** means—
 - (a) an activity or condition which is harmful or annoying and which gives rise to legal liability in the tort of public or private nuisance at law;
 - (b) an unreasonable interference with the use and enjoyment of a person of his or her ownership or occupation of land; or
 - (c) interference which causes material damage to land or other property on the land affected by the interference.⁸⁸
- 4.51 The DWER took the view that the definition is problematic and unnecessary, and advised local governments that its CEO will not consent to the making of waste local laws which include the definition.⁸⁹
- 4.52 The Committee is monitoring the issue of the definition of 'nuisance' in various categories of local laws.

⁸⁴ *Government Gazette*, No. 157, 1 September 2009, p 3395.

⁸⁵ Department of Environment and Energy, Australian Government, Canberra, viewed 21 February 2018, <<https://www.environment.gov.au/protection/ozone/rac>>.

⁸⁶ In clause 3.1(c)(iii) of the template, an owner or occupier must take all reasonable steps to 'ensure that each receptacle does not cause a nuisance to an occupier of adjoining premises'. In Schedule 1, paragraph (k), 'non-collectable waste' includes 'waste that is or is likely to become offensive or a nuisance, or give off an offensive or noxious odour'.

⁸⁷ Rebecca Brown, Manager, Waste and Recycling, WALGA, *Transcript of evidence*, 24 September 2014, pp 10–11.

⁸⁸ *City of Gosnells Waste Local Law 2016* cl 1.4(1) and *Shire of Chittering Waste Local Law 2017* cl 1.5(1). The Committee noted that an identical definition of 'nuisance' is contained in clause 1.3 of the WALGA template 'urban environment and nuisance local' law.

⁸⁹ For example, Jason Banks, Director General, then Department of Environment Regulation, Letter to City of Gosnells, 15 February 2017, p 1. The CEO had not consented to the making of the *City of Gosnells Waste Local Law 2016* and the *Shire of Chittering Waste Local Law 2016*, both of which were disallowed by the Legislative Council as a result: see paragraphs 4.11–4.12.

Drafting errors in the WALGA template fencing local law

4.53 When considering the *Shire of Halls Creek Fencing Local Law 2017*, the Committee detected a number of drafting errors, many of which would have resulted in making the local law unclear. The Shire had followed the WALGA template fencing local law very closely and the Committee acknowledged that the template was the source of the drafting errors in the Shire's local law.

4.54 Accordingly, the Committee contacted WALGA in September 2017 about some of these drafting errors and the Committee's letter to the Shire (seeking undertakings to amend the local law) was carbon copied to WALGA. The DLGSC was also informed so that, in future, similar issues in proposed fencing local laws could be avoided.

4.55 In response, WALGA advised the Committee that it was reviewing its template fencing local law, taking into account the Committee's views in relation to the *Shire of Halls Creek Fencing Local Law 2017*.⁹⁰ At the time of preparing this report, it appeared to the Committee that the changes to the template had already been made. For the information of local governments, the affected clauses and the track-changed corrections are listed below:

- Clause 2.11(2)(b):

unless the prohibited fence complies with "AS/NZS 3016:2002 Electrical installations—Electricity security fences"; and
- Clause 3.1(2)(d):

be forwarded to the CEO together with any fee imposed and determined by the local government under and in accordance with sections 6.16 to 6.19 of the *Local Government Act 1995*.
- Schedule 2—introductory paragraph:

Each of the identified categories in this Schedule is a sufficient fence on a Residential Lot and the fence design being certified by a practicing structural engineer as being suitable for wind loadings found in Region D Category 2 areas in accordance with the current edition of AS/NZS 1170.0:2002 Structural design actions - General principles.
- Schedule 2, items (d)–(f)—specifications for timber fences:
 - (a) corner posts to be 125mm x 125mm x 2 400mm and intermediate posts to be 125mm x 75mm x 2 400mm spaced at 2 400mm centres;
 - (b) corner posts to be strutted two ways with 100mm x 50mm x 450mm sole plates and 75mm x 50mm struts;
 - (c) intermediate posts to be doubled yankee strutted with 150mm x 25mm x 450mm struts; ~~(d) all posts to have tops with a 60mm weather cut and to be sunk at least 600mm into the ground;~~
 - (d) all posts to have tops with a 60mm weather cut and to be sunk at least 600mm into the ground;
 - ~~(e)~~ rails to be 75mm x 50mm with each rail spanning 2 bays of fencing double railed or bolted to each post with joints staggered;

⁹⁰ James McGovern, Manager Governance, WALGA, Email, 14 September 2017.

- (ef) the fence to be covered with 75mm x 20mm sawn pickets, 1 800mm in height placed 75mm apart and affixed securely to each rail; and
- (fg) the height of the fence to be 1 800mm except with respect to the front set back area for which there is no minimum height but which is subject to clause 7.
- Schedule 2, item (f)—specifications for timber fences:
 - (fg) the height of the fence to be 1 800mm except with respect to the front set back area for which there is no minimum height but which is subject to clause 72.2.
- Schedule 2, item (d)—specifications for corrugated fences:

the height of the fence to be 1 800mm except with respect to the front set back area for which there is no minimum height but which is subject to clause 72.2.
- Schedule 4, item (c)—specifications for non-electrified fences:

posts shall be cut not less than 1 800mm long x 50mm diameter at small end if round or 125mm x 60mm if split or sawn timber.

Drafting errors in the WALGA template bush fire brigades local law

4.56 The Committee considered the *Shire of Collie Bush Fire Brigades Local Law 2017* in October 2017 and identified a number of drafting errors, two of which were derived from the WALGA template. The Committee has notified WALGA of the two issues. At the time of preparing this report, those issues were still present in the template. The Committee’s suggested corrections (with track changes) are listed below:

- Clause 1.2(1):

“**Rules**” means the Rules Governing the Operation of Bush Fire Brigades set out in the First Schedule ~~as varied from time to time under clause 2.5.~~
- First Schedule, clause 2.6:

If any application for membership is approved, the Secretary of the bush fire brigade is to supply registration details to the Department of Fire and Emergency Services within 14 days of a person being admitted to membership in the form required by the Department from time to time.

5 Conclusion

5.1 The Committee performs the important role of overseeing delegated legislation on behalf of the Parliament, and giving guidance where necessary to persons and bodies making delegated legislation. The Committee looks forward to another productive and fulfilling year in 2018.

APPENDIX 1

LOCAL GOVERNMENT ACT 1995 SECTIONS 3.12 AND 3.13

Local Government Act 1995

Part 3 Functions of local governments

Division 2 Legislative functions of local governments

s. 3.11

Subdivision 2 — Local laws made under any Act

3.11. Subdivision applies to local laws made under any Act

This Subdivision applies to local laws made under this Act and the procedure for making them and, unless a contrary intention appears in that other Act, to local laws made under any other Act, and the procedure for making them.

3.12. Procedure for making local laws

- (1) In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.
- (2A) Despite subsection (1), a failure to follow the procedure described in this section does not invalidate a local law if there has been substantial compliance with the procedure.
- (2) At a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner.
- (3) The local government is to —
 - (a) give Statewide public notice stating that —
 - (i) the local government proposes to make a local law the purpose and effect of which is summarized in the notice; and
 - (ii) a copy of the proposed local law may be inspected or obtained at any place specified in the notice; and
 - (iii) submissions about the proposed local law may be made to the local government before a day to be specified in the notice, being a day that is not less than 6 weeks after the notice is given;
 - and
 - (b) as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the

Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister; and

- (c) provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.
- (3a) A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.
- (4) After the last day for submissions, the local government is to consider any submissions made and may make the local law* as proposed or make a local law* that is not significantly different from what was proposed.

* *Absolute majority required.*

- (5) After making the local law, the local government is to publish it in the *Gazette* and give a copy of it to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.
- (6) After the local law has been published in the *Gazette* the local government is to give local public notice —
- (a) stating the title of the local law; and
 - (b) summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and
 - (c) advising that copies of the local law may be inspected or obtained from the local government's office.
- (7) The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.
- (8) In this section —
- making** in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.

Local Government Act 1995

Part 3 Functions of local governments

Division 2 Legislative functions of local governments

s. 3.13

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

3.13. Procedure where significant change in proposal

If during the procedure for making a proposed local law the local government decides to make a local law that would be significantly different from what it first proposed, the local government is to recommence the procedure.

3.14. Commencement of local laws

- (1) Unless it is made under section 3.17, a local law comes into operation on the 14th day after the day on which it is published in the *Gazette* or on such later day as may be specified in the local law.
- (2) A local law made under section 3.17 comes into operation on the day on which it is published in the *Gazette* or on such later day as may be specified in the local law.

[Section 3.14 amended by No. 1 of 1998 s. 9.]

3.15. Local laws to be publicised

A local government is to take reasonable steps to ensure that the inhabitants of the district are informed of the purpose and effect of all of its local laws.

3.16. Periodic review of local laws

- (1) Within a period of 8 years from the day when a local law commenced or a report of a review of the local law was accepted under this section, as the case requires, a local government is to carry out a review of the local law to determine whether or not it considers that it should be repealed or amended.
- (2) The local government is to give Statewide public notice stating that —

GLOSSARY

Term	Definition
Committee	Joint Standing Committee on Delegated Legislation
DLGSC	Department of Local Government, Sport and Cultural Industries
DoH	Department of Health
DWER	Department of Water and Environmental Regulation
LGA	<i>Local Government Act 1995</i>
WALGA	Western Australian Local Government Association
WARR Act	<i>Waste Avoidance and Resource Recovery Act 2007</i>
Working Group	Local Laws Working Group

Joint Standing Committee on Delegated Legislation

Date first appointed:

15 June 2017

Terms of Reference:

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

'10. Joint Standing Committee on Delegated Legislation

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

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

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

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

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

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

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

- (a) is within power;
- (b) has no unintended effect on any person's existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.

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

- (a) any proposed or existing template, *pro forma* or model local law;
- (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
- (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.

10.8 In this order-

"instrument" means -

- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
- (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

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



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