

40TH PARLIAMENT



Report 12

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Shire of Northam Cemeteries Amendment Local Law 2017

Presented by
Ms Emily Hamilton MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

August 2018

Joint Standing Committee on Delegated Legislation

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ISBN 978-1-925578-44-7



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EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (Committee) concluded that the Shire of Northam (Shire) did not comply substantially with section 3.12 of the *Local Government Act 1995* (LGA) when it made the *Shire of Northam Cemeteries Amendment Local Law 2017*. Section 3.12 prescribes the mandatory procedures for making local laws.
- 2 After adopting the local law (Adopted Local Law), the Shire amended the substance of one clause of the local law. The Shire then completed the final steps of the local law-making process (gazettal and notification) with that different version of the local law (Gazetted Local Law).
- 3 That is, the Shire:
 - a. published (in the *Government Gazette*)
 - and
 - b. notified the Minister for Local Government and the people in its district of, a local law that was different to the Adopted Local Law.
- 4 This is procedurally problematic because the Shire breached:
 - a. section 3.12(5) of the LGA by failing to gazette, and provide the Minister for Local Government with a copy of, the Adopted Local Law. The Committee considered that the failure to gazette the Adopted Local Law was a fundamental flaw in the process.
 - b. section 3.12(6) of the LGA by failing to give 'local public notice' of the Adopted Local Law.
- 5 The Gazetted Local Law is invalid and offends the Committee's Term of Reference 10.6(a) because it is not 'within power' of its enabling Act, the LGA.

Recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

RECOMMENDATION 1

Page 3

The *Shire of Northam Cemeteries Amendment Local Law 2017* gazetted on 12 December 2017 be disallowed.

1 Reference and procedure

- 1.1 The *Shire of Northam Cemeteries Amendment Local Law 2017* was published in the *Government Gazette* on 12 December 2017 (Gazetted Local Law) (Appendix 1).
- 1.2 Upon gazettal, the Gazetted Local Law stood referred to the Joint Standing Committee on Delegated Legislation (Committee).¹ On 13 March 2018, the Gazetted Local Law was tabled in the Parliament and became subject to disallowance.

2 Statutory procedure for making a local law

- 2.1 Local governments are empowered to make laws to enable them to perform their functions under the *Local Government Act 1995* (LGA).²
- 2.2 The procedural steps necessary for a local government to make a local law³ are highly prescriptive and mandatory. These steps are set out in section 3.12 of the LGA (Appendix 2).
- 2.3 The Committee is of the view that:
 - where a local government does not comply with the mandatory sequential procedure set out in section 3.12 of the LGA
 - and
 - this cannot be excused pursuant to section 3.12(2A),the local law is beyond power and invalid.
- 2.4 The Committee's position is well established and documented in previous reports.⁴

3 Scrutiny of the Gazetted Local Law

- 3.1 The Committee scrutinised the Gazetted Local Law at its meetings on 19 March and 11 April 2018. The Committee noted that it was different from the local law which was proposed and eventually adopted by the Shire of Northam's Council on 15 November 2017 (Adopted Local Law) (Appendix 3). The Adopted Local Law sought to delete and replace clause 6.2 of the *Shire of Northam Cemeteries Local Law 2008*. The Gazetted Local Law merely deletes clause 6.2.

Breach of sections 3.12(5) and (6) of the LGA

- 3.2 Section 3.12(5) of the LGA required the Shire to gazette the Adopted Local Law and give a copy of the Adopted Local Law to the Minister for Local Government (Minister).⁵ These requirements were not met because the Shire:

¹ Committee Term of Reference 10.5: *Standing Orders of the Legislative Council* Schedule 1, cl 10.5.

² LGA s 3.5. The general function of a local government is 'to provide for the good government of persons in its district': LGA s 3.1.

³ Including a local law which amends or repeals an existing local law: LGA s 3.12(8).

⁴ For example, see 38th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 42, *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2011. More recently, see 40th Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 11, *Shire of Broome Parking and Parking Facilities Amendment Local Law (2) 2017*, 17 May 2018.

⁵ Pursuant to LGA s 3.12(5).

- published the Gazetted Local Law (instead of the Adopted Local Law) in the *Government Gazette* (see Appendix 1)

and

- gave a copy of the Gazetted Local Law (instead of the Adopted Local Law) to the Minister.⁶

3.3 Section 3.12(6) of the LGA requires a local government to give ‘local public notice’⁷ of the local law it has made, after that law is published in the *Government Gazette*. Section 3.12(6) necessarily assumes that a local government has gazetted what it had adopted.

3.4 As a consequence of gazetting a different local law to the one which was adopted, the Shire also failed to give ‘local public notice’ of the Adopted Local Law. This is because the notice made reference to the Gazetted Local Law, which was different to the Adopted Local Law. The notice also suggested, incorrectly, that the Adopted Local Law had been gazetted. The notice informed readers that:

At the 15 November 2017 Ordinary Council meeting, the Shire of Northam Council adopted the Shire of Northam Cemeteries Amendment Local Law 2017 [that is, the Adopted Local Law] ...

...

This local law comes into operation fourteen (14) days after the date of its publication in the *Government Gazette* dated 12 December 2017.⁸

3.5 On these bases, the Gazetted Local Law does not technically comply with the section 3.12 process and is invalid unless that compliance can be excused under section 3.12(2A) (refer to paragraphs 4.1–4.7).

4 Was there substantial compliance with section 3.12 of the LGA for the Gazetted Local Law?

4.1 Section 3.12(2A) of the LGA excuses deviations from the local law-making procedure as long as there has been ‘substantial compliance’ with the procedure.⁹ The Committee considered whether the processes which *were* undertaken by the Shire constituted substantial compliance. In the Committee’s view, they did not.

4.2 The Shire gazetted a local law which was different to the Adopted Local Law. The Committee considered this to be a fundamental flaw in the process. To compound the problem, the Shire also gave the Minister a copy of, and notified the people in its district of, a local law that was different to the Adopted Local Law.

4.3 Section 3.12(5) provides that:

After making the local law, the local government is to publish it in the *Gazette*
(underlining added)

⁶ C Allen, Senior Legislation Officer—Local Government, Department of Local Government, Sport and Cultural Industries, Email, 21 March 2018.

⁷ Defined in LGA s 1.7.

⁸ Shire of Northam, ‘Public notice—Cemeteries Amendment Local Law 2017’, *The West Australian*, 20 December 2017, p 76. In the explanatory material provided to the Committee, it was advised that the same notice was exhibited on a notice board at the Shire’s offices and every library in its district from 18 to 27 December 2017.

⁹ This section is reproduced in Appendix 2.

- 4.4 The word 'it' refers to the local law as it was adopted by the Council. There is no room in this part of the local law-making procedure for the local government to change the local law. Otherwise, all of the processes which occurred before gazettal, including public consultation, would be rendered meaningless.
- 4.5 Publication of legislation is a fundamental requirement of law-making.¹⁰ It is the means by which the public are made aware of:
- the fact that an instrument of legislation has been made
and
 - the substance of that legislation.
- 4.6 In passing section 3.12(5), the Parliament determined that local laws must be published in the *Government Gazette*. This publication must accurately inform the reader of the substance of the local law which has been adopted by a local government. Put another way, there cannot be any substantive differences between a local law when it is adopted and when it is published.
- 4.7 The Committee is of the view that the requirement to accurately gazette the local law as adopted is a critical step in the local law-making procedure. If this requirement is not met, there cannot be 'substantial compliance' with the procedure under section 3.12(2A).

5 Conclusion regarding the Gazetted Local Law

- 5.1 The Committee Term of Reference 10.6(a) states that:

In its consideration of an instrument [including a local law], the Committee is to inquire whether the instrument ... is within power;

- 5.2 The Committee concludes that the Gazetted Local Law is invalid by reason of non-compliance with section 3.12 of the LGA. It offends Term of Reference 10.6(a). The Committee therefore recommends to the Parliament that the Gazetted Local Law be disallowed.
- 5.3 Disallowing invalid local laws ensures that they are removed from the public record, thereby reducing the risk of public misinformation.

6 Recommendation regarding the Gazetted Local Law

- 6.1 The Committee makes the following recommendation:

RECOMMENDATION 1

The *Shire of Northam Cemeteries Amendment Local Law 2017* gazetted on 12 December 2017 be disallowed.



Ms Emily Hamilton MLA

Chair

¹⁰ *Watson v Lee* (1979) 144 CLR 374 at pp 379 (per Barwick CJ) and 394 (per Stephen J).

— PART 1 —

CEMETERIES

CE401

CEMETERIES ACT 1986 LOCAL GOVERNMENT ACT 1995

Shire of Northam

CEMETERIES AMENDMENT LOCAL LAW 2017

Under the powers conferred by the *Cemeteries Act 1986*, the *Local Government Act 1995* and under all other powers enabling it, the Council of the Shire of Northam resolved by Absolute Majority on 15 November 2017 to make the following local law.

1. Citation

This local law may be cited as the *Shire of Northam Cemeteries Amendment Local Law 2017*.

2. Commencement

This local law comes into operation 14 days after the date of its publication in the *Government Gazette*.

3. Principal local law amended

3.1 In this local law the *Shire of Northam Cemeteries Local Law 2008* as published in the *Government Gazette* on 16 September 2008, is referred to as the Principal Local Law.

3.2 The Principal local law is amended.

Clause 1.2 new clause inserted

Insert clause 1.2A as follows—

Clause 1.2A—Application

This local law applies to the Northam Cemetery located in the Shire of Northam.

Clause 1.2A amended

(1) In clause 1.2 insert the following definitions in alphabetical order—

“coffin” a tapered wooden box suitable for burial;

“funeral” a ceremony at which a deceased person is buried or cremated;

“headstone” a slab of stone set up at the head of a grave, typically inscribed with the name of the dead person;

“memorial” a statue or structure established to remind people of a person or event;

“memorial plaque” in accordance with the dimensions given in Clause 7.15;

“monument” a statue or other structure placed over a grave in memory of the dead;

“Monumental Mason's Licence” means a licence issued under Clause 7.16; and

“right of burial” means the right to use a specified area of a cemetery for burial.

(2) In clause 1.2 delete the entire definition for “mausoleum”.

Clause 5.2 amended

In Clause 5.2 delete “or clause 3.2”.

Clause 6.1 amended

Clause 6.1 is amended as follows—

(a) In subclause (1)(a) delete “permission” and insert “written approval”; and

(b) In subclause (2) delete “permission” and insert “written approval.”

Clause 6.2 amended

Delete clause 6.2.

Clause 7.20 Cancellation of a Monumental Mason's Licence

In clause 7.20 delete subclause (3).

Clause 8.1 amended

In clause 8.1 delete "Subject to clause 8.2" and capitalise the word "A".

Clause 8.2 replaced

Delete clause 8.2 and insert—

Clause 8.2 Assistance Animals

A person whose impairment requires, may be accompanied by an assistance animal as defined in section 9(2) of the *Disability Discrimination Act 1992* (Cth).

Dated: 24 November 2017.

The Common Seal of the Shire of Northam was affixed by authority of a resolution of Council in the presence of—

CHRISTOPHER R. ANTONIO, President.
JASON B. WHITEAKER, Chief Executive Officer.

LOCAL GOVERNMENT

LG301

DOG ACT 1976
LOCAL GOVERNMENT ACT 1995

City of Vincent

DOGS AMENDMENT LOCAL LAW 2017

Under the powers conferred by the *Local Government Act 1995*, the *Dog Act 1976* and by all other powers enabling it, the Council of the City of Vincent resolved on 14 November 2017 to make the following local law.

1. Citation

This local law may be cited as the *City of Vincent Dogs Amendment Local Law 2017*.

2. Commencement

This local law comes into operation 14 days after the date of its publication in the *Government Gazette*.

3. Principal local law

In this local law the *City of Vincent Dogs Local Law 2007* published in the *Government Gazette* on 21 November 2007 and as amended on 24 February 2012 and 11 January 2013, is referred to as the principal local law. The principal local law is amended.

4. Table of Contents

In the table of contents—

- (a) delete clauses 2.2, 2.3 and 2.4 and insert—

"2.2 Release of impounded dog

2.3 No breaking into or destruction of pound"

- (b) delete PART 5, PART 6 and PART 7 and insert—

"PART 5—MISCELLANEOUS

5.1 Offence to foul a street or public place

PART 6—ENFORCEMENT

6.1 Interpretation

6.2 Modified penalties

6.3 Issue of infringement notice

6.4 Failure to pay modified penalty

6.5 Payment of modified penalty

6.6 Withdrawal of infringement notice

6.7 Service of infringement notice or notice of withdrawal"

- (c) delete "SCHEDULE 4" and "SCHEDULE 5"

APPENDIX 2

LOCAL LAW-MAKING PROCEDURE—LGA S 3.12

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.

APPENDIX 3

ADOPTED LOCAL LAW

Ordinary Council Meeting Minutes
15 November 2017



Attachment 1

Cemeteries Act 1986 Local Government Act 1995

SHIRE OF NORTHAM

CEMETERIES AMENDMENT LOCAL LAW 2017

Under the powers conferred by the *Cemeteries Act 1986*, the *Local Government Act 1995* and under all other powers enabling it, the Council of the Shire of Northam resolved by Absolute Majority on **Date** to make the following local law.

1. Citation

This local law may be cited as the *Shire of Northam Cemeteries Amendment Local law 2017*

2. Commencement

This local law comes into operation 14 days after the date of its publication in the *Government Gazette*.

3. Principal local law amended

3.1 In this local law the *Shire of Northam Cemeteries Local Law 2008* as published in the *Government Gazette* on 16 September 2008, is referred to as the Principal Local Law.

3.2 The Principal local law is amended.

Clause 1.2 new clause inserted

Insert new clause 1.2A as follows:

Clause 1.2A – Application

This local law applies to the Northam Cemetery located in the Shire of Northam.

Clause 1.2A Amended (formerly 1.2)

(1) In clause 1.2 insert the following definitions in alphabetical order:

“**coffin**” – a tapered wooden box suitable for burial;

“**funeral**” – a ceremony at which a deceased person is buried or cremated;

“**headstone**” – a slab of stone set up at the head of a grave, typically inscribed with the name of the dead person;

“**memorial**” – a statue or structure established to remind people of a person or event;

“**memorial plaque**” – in accordance with the dimensions given in Clause 7.15;

“**monument**” – a statue or other structure placed over a grave in memory of the dead;

“**Monumental Mason’s Licence**” – means a licence issued under cl.7.16; and

"right of burial" - means the right to use a specified area of a cemetery for burial.

(2) In clause 1.2 delete the entire definition for "mausoleum"

Clause 5.2 amended

In Clause 5.2 delete "or clause 3.2"

Clause 6.1 amended

Clause 6.1 is amended as follows:

- (a) In subclause (1)(a) delete "permission" and insert "written approval"; and
- (b) In subclause (2) delete "permission" and insert "written approval."

Clause 6.2 amended

6.2 delete clause 6.2 and insert:

- (1) A person other than the Board shall not construct a brick grave, or vault within the cemetery.
- (2) A person may request the Board to construct a vault within the cemetery which vault shall at all times remain the property of the Board.
- (3) An application under subclause (2) shall be in writing and shall be accompanied by payment of the set fee.
- (4) A person shall not place a dead body in a grave except:-
 - (a) in a closed coffin; and
 - (b) in a soundly constructed chamber; and
 - (c) in accordance with subclause (5).
- (5) The number of burials in a chamber must not exceed the number for which the chamber was designed.

Clause 7.20 Cancellation of a Monumental Mason's Licence

In clause 7:20 delete subclause (3)

Clause 8.1 amended

In clause 8.1 delete "Subject to clause 8.2" and capitalise the word "A".

Clause 8.2 replaced

Delete clause 8.2 and insert:

Clause 8.2 Assistance Animals

A person whose impairment requires, may be accompanied by an assistance animal as defined in section 9(2) of the *Disability Discrimination Act 1992* (Cth).

DATED: _____20__

The Common Seal of the Shire of Northam was affixed by authority of a resolution of Council in the presence of:

Steven B Pollard
President

Jason B Whiteaker
Chief Executive Officer

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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