

**40TH PARLIAMENT**



## **Report 13**

# **JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

*Shire of Toodyay Health 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**

### **Members as at the time of this inquiry:**

Ms Emily Hamilton MLA (Chair)

Mr Ian Blayney MLA

Dr David Honey MLA

Mrs Robyn Clarke MLA

Hon Robin Chapple MLC (Deputy Chair)

Hon Kyle McGinn MLC

Hon Martin Pritchard MLC

Hon Charles Smith MLC

### **Staff as at the time of this inquiry:**

Mr Sam Hastings (Advisory Officer (Legal))

Ms Clair Siva (Committee Clerk)

### **Address:**

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)

Website: [www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)

**ISBN 978-1-925578-45-4**



# CONTENTS

---

- Executive summary ..... i**
- 1 Reference and procedure..... 1**
- 2 Statutory procedure for making a local law concerning waste..... 1**
- 3 Scrutiny of the Local Law..... 2**
- 4 Could the CEO have provided consent to the Local Law?..... 3**
- 5 Conclusion..... 4**
- 6 Recommendation..... 4**
- Appendix 1 ..... 5**
- Appendix 2 ..... 7**

---

## EXECUTIVE SUMMARY

---

- 1 The Joint Standing Committee on Delegated Legislation (Committee) is of the view that the Shire of Toodyay did not follow section 61 of the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) when it made Part 4 Division 2 and items 12 to 18 of Schedule 13 of the *Shire of Toodyay Health Local Law 2017* (the Local Law).
- 2 The procedure in section 61 of the WARR Act provides that a local government can only make a local law concerning waste with the consent of the CEO of the department administering the WARR Act. The Shire of Toodyay failed to obtain the consent of the CEO prior to making the Local Law.
- 3 Part 4 Division 2 of the Local Law and items 12 to 18 in Schedule 13 are invalid as they do not comply with section 61 of the WARR Act and offend Committee Term of Reference 10.6(a) in that they are not '*within power*'.

### Recommendations

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

#### RECOMMENDATION 1

Page 4

The Committee recommends that Part 4 Division 2 and Items 12 to 18 in Schedule 13 of the *Shire of Toodyay Health Local Law 2017* be disallowed.

## 1 Reference and procedure

- 1.1 On 22 December 2017 the *Shire of Toodyay Health Local Law 2017* was gazetted.
- 1.2 Upon gazettal, the Local Law stood referred to the Joint Standing Committee on Delegated Legislation (Committee). Once the Local Law was tabled in the Legislative Council, it became an instrument that may be subject to disallowance.

## 2 Statutory procedure for making a local law concerning waste

- 2.1 The power to make local laws is derived from the *Local Government Act 1995*. Other legislation provides a concurrent basis for making local laws on certain issues.
- 2.2 Section 64(2) of the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) lists a range of purposes for which local laws can be made in relation to waste, namely:

(2) Local laws may be made for all or any of the following purposes —

- (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;
- (e) if a local government itself undertakes or contracts for the removal of waste, requiring the waste to be placed in waste receptacles provided by the local government;
- (f) prescribing intervals at which the contents of the receptacles will be removed by a local government;
- (g) requiring the temporary placing of waste receptacles in streets or lanes by owners or occupiers of property for collection of waste, and requiring the replacement of the receptacles on the property;
- (h) providing for the maintenance by owners and occupiers of waste receptacles provided by a local government;
- (i) providing for the issue of approvals to collect local government waste and remove it from premises;
- (j) fixing fees and charges in relation to waste services provided by a local government and the issue of approvals under paragraph
- (i), and prescribing the persons liable and the method of recovery of amounts not duly paid.

- 2.3 However, the WARR Act imposes a consent requirement for a local government to make a local law concerning any of the purposes set out in section 64. Section 61 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.

- 2.4 “CEO” is defined in section 3 of the WARR Act:

**CEO** means chief executive officer of the department of the Public Service principally assisting in the administration of this Act.

- 2.5 At the time that the Local Law was made, the department of the Public Service principally assisting in the administration of the WARR Act was the Department of Water and Environmental Regulation.

- 2.6 The Committee is of the view that the obtaining of the CEO’s consent is a condition precedent to the making of any local law concerning matters contained in section 64 of the WARR Act, irrespective of the express law-making power under which the law is made.

### 3 Scrutiny of the Local Law

- 3.1 The Committee first scrutinised the Local Law at its meeting on 11 April 2018. The Local Law contained a number of parts relating to sanitation, housing, pest control, infectious disease and waste.

- 3.2 Of note to the Committee was Part 4 Division 2 of the Local Law which dealt with the following matters:

*Division 2—Disposal of Refuse*

- 4.2.1 Interpretation
- 4.2.2 Receptacles
- 4.2.3 Exemption
- 4.2.4 Use of Receptacles
- 4.2.5 Ownership of Receptacles
- 4.2.6 Damage to Receptacles
- 4.2.7 Use of Other Containers
- 4.2.8 Suitable Enclosure
- 4.2.9 Building Construction
- 4.2.10 Deposit of Refuse
- 4.2.11 Removal from Refuse Disposal Site
- 4.2.12 Removal of Rubbish from Premises or Receptacle
- 4.2.13 Burning or Rubbish or Refuse

- 3.3 In addition, items 12 to 18 in Schedule 13 of the Local Law implemented modified penalties for breaches of provisions contained in Part 4 Division 2.

- 3.4 To demonstrate compliance with the required statutory procedure to make a local law, the Shire of Toodyay supplied the Committee with a range of documents. These documents did

not include a statement showing the consent of the Chief Executive of the Department of Water and Environmental Regulation to make the Local Law.

- 3.5 As the Committee had not been able to determine if consent was provided, it resolved to give notice of motion to disallow the Local Law in the Legislative Council. On 12 April 2018 the Committee wrote to the Shire of Toodyay requesting it to supply a copy of the CEO's consent to make the waste provisions contained in the Local Law.
- 3.6 On 23 May 2018 the Committee received copies of two letters submitted by the CEO of the Department of Water and Environmental Regulation. One letter, dated 22 December 2017, was from the CEO of the Department to the Shire of Toodyay.<sup>1</sup> In that letter the CEO writes:

I refer to your letter dated 28 August 2017 requesting my consent to Part 4, Division 2 of the Shire of Toodyay proposed Health Local Law 2017. I regret that I would be unable to consent to the proposed Local Law in its current form. I make this determination subject to section 61(3) of the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) to give you the opportunity to reconsider your submission.

- 3.7 And further:

The waste local laws in the proposed Local Law have not been made under the appropriate head of power, which is section 61 of the WARR Act.

- 3.8 This letter confirms to the Committee that the Shire of Toodyay did not have the necessary consent to make Part 4 Division 2 of the Local Law and the associated modified penalties contained in Schedule 13.

## 4 Could the CEO have provided consent to the Local Law?

- 4.1 The enacting formula to the Local Law says:

Under the powers conferred by subdivision 2 of Division 2 of Part 3 of the *Local Government Act 1995* and under all other powers enabling it, the Council of the Shire of Toodyay resolved on 28 November 2027 to make the following local law.

- 4.2 The general law-making power contained in the *Local Government Act 1995* was expressly relied upon in making the Local Law along with '*all other powers enabling it*'.
- 4.3 Section 43(2) of the *Interpretation Act 1984* contains a provision that deems that subsidiary legislation is supported by all powers under which it can be made, not just those it is expressed to be made under. That section provides:

(2) 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.

- 4.4 The Committee's view is that all local laws dealing with the matters set out in section 64 of the WARR Act, or generally for carrying into effect the provisions of Part 6 of the WARR Act, are made under section 61 of the WARR Act, whether or not they are expressed to be made under that Act. Further, local laws dealing with waste that are expressly made under another Act should not be refused the consent of the CEO on that basis alone.

---

<sup>1</sup> This letter appears at Appendix 1 of this report.

4.5 The Committee expressed this view to the Minister for Environment by letter on 28 June 2018.<sup>2</sup>

## 5 Conclusion

5.1 Committee Term of Reference 10.6(a) states:

In its consideration of an instrument, the Committee is to inquire whether the instrument is ... within power.

5.2 Part 4 Division 2 and items 12 to 18 in Schedule 13 of the Local Law are invalid by reason of non-compliance with section 61 of the *Waste Avoidance and Resource Recovery Act 1995*. They offend Term of Reference 10.6(a). The Committee therefore recommends to the Legislative Council that those parts of the Local Law be disallowed.

5.3 The Committee does not usually recommend selective disallowance except in circumstances where a particular provision in a local law can be severed without affecting the integrity of the rest of the local law. The Committee is of the view that selective disallowance is appropriate on this occasion.

5.4 There are a number of benefits in recommending disallowance of invalid local laws, including ensuring that they are quickly removed from the public record, thereby reducing the risk of public misinformation.

## 6 Recommendation

6.1 The Committee makes the following recommendation.

### RECOMMENDATION 1

The Committee recommends that Part 4 Division 2 and Items 12 to 18 in Schedule 13 of the *Shire of Toodyay Health Local Law 2017* be disallowed.



Ms Emily Hamilton MLA

**Chair**

---

<sup>2</sup> This letter appears at Appendix 2 of this report.



# APPENDIX 1



Government of Western Australia  
Department of Water and Environmental Regulation

Year: 2017  
Case: LAW1000P01001000R0140  
Case: CE0287717  
Employee: Deanne Scott  
Phone: 08 9471 0925  
Email: Deanne.Scott@water.wa.gov.au

Mr Stan Scott  
Chief Executive Officer  
Shire of Toodyay  
records@toodyay.wa.gov.au

FILE COPY

E-MAILED  
22/12/17

SCANNED

Dear Mr Scott

## SHIRE OF TOODYAY PROPOSED HEALTH LOCAL LAW 2017

I refer to your letter dated 28 August 2017 requesting my consent to Part 4, Division 2 of the Shire of Toodyay proposed Health Local Law 2017. I regret that I would be unable to consent to the proposed Local Law in its current form. I make this determination subject to section 61(3) of the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) to give you the opportunity to reconsider your submission.

Since 2008, the power to make waste local laws is conferred in the WARR Act and the power to make waste local laws under the *Health Act 1911* has been repealed.

The waste local laws in the proposed Local Law have not been made under the appropriate head of power, which is section 61 of the WARR Act. Rather, it has been made under the *Health Act 1911* and would, therefore, not be regarded as being validly made.

Additionally, many of the waste provisions included in the *Health Act 1911* have been repealed and have not been included in the WARR Act. Therefore, including these provisions in the proposed Local Law is regarded as beyond the power of the WARR Act.

In 2011, the Joint Standing Committee on Delegated Legislation disallowed two waste local laws. The details of the Committee's reasons for the disallowance can be found at [www.parliament.wa.gov.au/Parliament/commit.nsf/\(ReportsAndEvidence\)/1BCB7CE6149A18E648257952000F8611?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/1BCB7CE6149A18E648257952000F8611?opendocument). Many of the issues identified by the Committee are included in the waste provisions of the Shire of Toodyay proposed Health Local Law 2017.

In response to the disallowed local laws:

- the then Department of Environment Regulation published a *Guide to drafting waste local laws*, which provides general guidance for local governments when drafting a waste local law, available at: [https://www.der.wa.gov.au/images/documents/your-environment/waste/Guideline\\_for\\_drafting\\_local\\_waste\\_laws.pdf](https://www.der.wa.gov.au/images/documents/your-environment/waste/Guideline_for_drafting_local_waste_laws.pdf); and
- funding from the Waste Avoidance and Resource Recovery Account was provided to the Western Australian Local Government Association to develop a template for waste local laws. The Committee expressed its general approval for the template in its November 2014 *Report 77 Inquiry into a proposed template waste local law*. The template is available at [www.wastenet.net.au/waste-local-law.aspx](http://www.wastenet.net.au/waste-local-law.aspx).

168 St Georges Terrace Western Australia 6000  
Locked Bag 33 Cloisters Square Perth WA 6850  
Telephone: 08 6364 7000 Facsimile: 08 6364 7001  
[www.dwer.wa.gov.au](http://www.dwer.wa.gov.au)

I recommend that the Shire of Toodyay make a separate waste local law under the WARR Act, using the waste local law template.

Should your staff require further information in relation to this matter, please contact the Department of Water and Environmental Regulation's Policy Officer, Ms Leanne Reid, on 6364 7028 or by email at [leanne.reid@dwer.wa.gov.au](mailto:leanne.reid@dwer.wa.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Mike Rowe', consisting of a large loop followed by a wavy line.

Mike Rowe  
**DIRECTOR GENERAL**

22<sup>nd</sup> December 2017

## APPENDIX 2

---

### JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION



Our ref: 4025.07 A696661

28 June 2018

Hon Stephen Dawson MLA  
Minister for Environment  
12th Floor, Dumas House  
2 Havelock Street  
WEST PERTH WA 6005

By email: [Minister.Dawson@dpc.wa.gov.au](mailto:Minister.Dawson@dpc.wa.gov.au)

Dear Minister

A handwritten signature in blue ink that reads 'Stephen' is written over the printed name 'Stephen'.

#### **Consent of the Department of Water and Environmental Regulation to waste local laws**

The Committee recently received a copy of a letter from the Director General of the Department of Water and Environmental Regulation regarding the *Shire of Toodyay Health Local Law 2017*.

That letter stated:

*I would be unable to provide consent to the Health Local Law in its current form as the waste provisions in the proposed law had not been made under the appropriate head of power, which is section 61 of the Waste Avoidance and Resource Recovery Act 2007 (WARR Act). The waste local law would therefore not be regarded as being validly made.*

Section 43(2) of the *Interpretation Act 1984* provides that 'where any subsidiary legislation purports to be made in exercise of a particular power or powers, it shall be deemed also to have been made in exercise of all powers under which it may be made.'

The Committee therefore takes the view that local laws dealing with the matters set out in section 64 of the WARR Act, or generally for carrying into effect the provisions of Part 6 of the WARR Act, are made under section 61 of the WARR Act, whether or not they are expressed to be made under that Act. In the Committee's view, local laws dealing with waste that are purportedly made under another Act should not be refused consent on this basis alone.

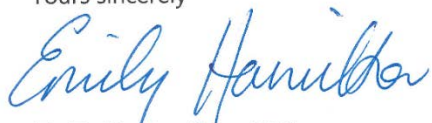
In the case of the *Shire of Toodyay Health Local Law 2017*, consent was not obtained. The Committee brings this issue to your attention solely for the purposes of future local laws in relation to which consent of the Director General is sought.

---

Legislative Council Committee Office  
18-32 Parliament Place | West Perth  
Postal address: Parliament House | 4 Harvest Terrace | West Perth WA 6005  
Telephone: 08 9222 7300 | Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)

If you have any questions about this matter, please contact Ms Kimberley Ould, Advisory Officer (Legal) on 9222 7456 or delleg@parliament.wa.gov.au

Yours sincerely



**Ms Emily Hamilton MLA**

Chair

cc Leanne Reid  
Department of Water and Environment Regulation  
Leanne.Reid@dwer.wa.gov.au

*Please note that this correspondence (including any enclosures) is confidential and privileged. You may only disclose or copy this material to your legal advisers or officers and agencies within your portfolio to the extent that it is reasonably necessary to obtain any information sought by the Committee through this correspondence. Each of the persons to whom you distribute this material for this limited purpose should be made aware of the confidential and privileged status of the material.*

# 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*.



---

Parliament House,  
4 Harvest Terrace, West Perth WA 6005  
Telephone: +61 8 9222 7222  
Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)  
Website: <http://www.parliament.wa.gov.au>