SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION IN RELATION TO THE ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN DECEMBER 20 2003 AND JUNE 30 2004 WITH RESPECT TO LOCAL LAWS

Presented by Mr Martin Whitely MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

Report 9
August 2004

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

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

"**6. Delegated Legislation Committee**

6.1 A Delegated Legislation Committee is established.

6.2 The Committee consists of 8 members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.

6.3 A quorum is 4 members of whom at least 1 is a member of the Council and 1 a member of the Assembly.

6.4 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.

6.5 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.

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

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness; or

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; or

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable;

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

6.7 In this clause –

"adverse effect" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"instrument" means –

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

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

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

Members as at the time of this report:

Mr Martin Whitely MLA (Chairman)
Hon Ray Halligan MLC (Deputy Chairman)
Hon Robin Chapple MLC
Hon Ljiljanna Ravlich MLC
Mr Rod Sweetman MLA
Mr Terry Waldron MLA
Mr Peter Watson MLA
Hon Barbara Scott MLC

Staff as at the time of this inquiry:

Kerry-Jayne Braat, Committee Clerk
Denise Wong, Advisory Officer (Legal)

Address:
Email: delleg@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au
Parliament House, Perth WA 6000, Telephone (08) 9222 7222

ISBN 1 9208 8615 X

LIST OF ABBREVIATIONS

AC	Law Reports (Third Series) Appeal Cases
the Act	*Local Government Act 1995*
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
CLR	Commonwealth Law Reports
the Code	*Road Traffic Code 2000*
Committee	Joint Standing Committee on Delegated Legislation
Eighth Report	Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in relation to Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, Report Number 8, April 2004
Fourth Report	Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in Relation to the City of Perth Code of Conduct Local Law*, Report Number 4, September 2002
Governor's Cemeteries Model	Governor's *Model Local Law (Cemeteries) 1998* published in the *Government Gazette* on May 12 1998
LGR	Local Government Law Reports, New South Wales (1911 - 1956)
NSWLR	New South Wales Law Reports
Sixth Report	Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report Number 6, March 2003
SR (NSW)	State Reports, New South Wales
WALGA	Western Australian Local Government Association
WASCA	Supreme Court of Western Australia (Court of Appeal)

CONTENTS

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN DECEMBER 20 2003 AND JUNE 30 2004 WITH RESPECT TO LOCAL LAWS

---

1 INTRODUCTION

1.1 This is the second Report of the Joint Standing Committee on Delegated Legislation (**Committee**) in a series of reports aimed at informing:

- Parliament;
- local governments; and
- all other stakeholders in the local law making process,

of the Committee's position in relation to certain issues it has encountered with respect to local laws scrutinized between December 20 2003 and June 30 2004.

1.2 The first Report in this series deals with local laws that were scrutinized by the Committee between June 9 2003 and December 19 2003[1] (**Eighth Report**). It also provides a brief summary of the role of the Committee.

1.3 Some of the local laws discussed in this Report include local laws that:

- offend the Committee's terms of reference 6.6(a), (d) and (f)[2];
- regulate matters in such a manner that the local law is inconsistent with the empowering Act or another 'written law'[3];
- provide local governments with powers and immunities that are not authorized or contemplated by the empowering Act, such as ouster clauses, powers of entry onto private land and the power to make determinations;
- display problematic drafting;

---

1 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in relation to Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, Report Number 8, April 2004.

2 Refer to the Committee's terms of reference on the inside cover of this Report.

3 As defined in section 5 of the *Interpretation Act 1984*.

- employ problematic drafting techniques, such as incorporation by reference; and

- alter the common law without the necessary authority to do so.

2 GIVING LEGISLATIVE EFFECT TO LOCAL GOVERNMENT POLICIES OR CODES THROUGH INCORPORATION BY REFERENCE

2.1 This issue was dealt with in the Committee's fourth Report (**Fourth Report**) at pages 36 to 49[4] and pages 11 to 14 of the Eighth Report. It was also brought to the attention of all local governments at page 9 of the Department of Local Government and Regional Development's Local Laws Circular No 10-2003. The discussion in those references relate to two codes of conduct and a planning policy; however, the discussion applies equally to any form of code or policy devised by the local government and sought to be given legislative effect through incorporation into a local law by reference to the title of the code or policy.

Incorporation of Codes of Conduct

City of Gosnells Standing Orders Local Law 2003 and City of Nedlands Standing Orders Local Law

2.2 Clause 5.12 of the *City of Gosnells Standing Orders Local Law 2003* incorporates the City's Code of Conduct by reference to its title, so that the Code becomes a part of the local law. Any breach of the Code is treated as if it were a breach of the local law and the penalty provisions of the local law would then apply. Clause 92 of the *City of Nedlands Standing Orders Local Law* has the same effect with respect to the City of Nedlands' Code of Conduct.

2.3 The Committee considered that clause 5.12 of the *City of Gosnells Standing Orders Local Law 2003* and clause 92 of the *City of Nedlands Standing Orders Local Law*:

- are inconsistent with and not authorized nor contemplated by the local law's empowering Act, the *Local Government Act 1995* (**the Act**);

- amount to a subdelegation of legislative power; and

- avoid parliamentary and ministerial scrutiny.

2.4 The Committee received written confirmation from the City of Gosnells that its council had resolved to remove clause 5.12 from the *City of Gosnells Standing Orders Local Law 2003* as soon as possible. The City of Nedlands undertook in writing to:

---

[4] Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in Relation to the City of Perth Code of Conduct Local Law*, Report Number 4, September 2002.

- delete clause 92 from the *City of Nedlands Standing Orders Local Law*; and

- in the meantime, enforce the local law in a manner that would not be inconsistent with that future deletion.

2.5 The Committee is concerned that local governments are continuing to employ this method of incorporating their codes of conduct into their standing orders local laws, when this issue has already been the subject of numerous publications aimed at educating those involved in the process of local law making.

2.6 It is also queried whether the adoption of codes of conduct by individual local governments are even necessary, given that, in response to the Committee's Fourth Report, the Government has indicated its intention to introduce legislation to amend the Act so as to introduce uniform Rules of Conduct and establish a system through which breaches of those Rules will be investigated and punished.[5]

Incorporation of Other Internal Documents

Shire of Plantagenet Bush Fire Brigades Local Law

2.7 Clauses 2.4 and 5.1 of the *Shire of Plantagenet Bush Fire Brigades Local Law* provides that the:

- operation of bush fire brigades; and

- appointment, dismissal and management of brigade members by the bush fire brigades,

are to be governed by 'the Rules' determined by the local government.

2.8 'The Rules' are defined in clause 1.2 of the local law as the "…*Rules Governing the Operation of Bush Fire Brigades adopted by the local government from time to time.*" The local law merely makes reference to 'the Rules' and does not contain or attach the text of 'the Rules' in any way.

2.9 For the same reasons that were discussed in the references listed in paragraph 2.1, the Committee considered that clause 5.12 of this local law:

- is inconsistent with and not authorized nor contemplated by the Act;

- amounts to a subdelegation of legislative power; and

- avoids parliamentary and ministerial scrutiny.

2.10 In the Committee's view, this local law is also not authorized nor contemplated by the *Bush Fires Act 1954*. Section 62 of that Act provides that:

> *(1) A local government may make local laws in accordance with subdivision 2 of Division 2 of Part 3 of the* Local Government Act 1995 *for and in relation to -*
>
> …
>
> *(b) the organisation, establishment, maintenance and equipment with appliances and apparatus of bush fire brigades to be established and maintained by the local government; and*
>
> *(c) any other matters affecting the exercise of any powers or authorities conferred and the performance of any duties imposed upon the local government by this Act.*

2.11 Sections 41 and 43 of the Act also contemplate that local governments which establish and maintain bush fire brigades must provide for the establishment, organization and maintenance of the brigades in a local law:

> ***41. Bush Fire Brigades***
>
> *(1) For the purpose of carrying out normal brigade activities a local government may, in accordance with its local laws made for the purpose, establish and maintain one or more bush fire brigades and may, in accordance with those local laws, equip each bush fire brigade so established with appliances, equipment and apparatus.* (emphasis added)
>
> …
>
> ***43. Election and duties of officers of bush fire brigades***
>
> *A local government which establishes a bush fire brigade shall by its local laws provide for the appointment or election of a captain, a first lieutenant, a second lieutenant, and such additional lieutenants as may be necessary as officers of the bush fire brigade, and prescribe their respective duties.* (emphasis added)

[5] Letter from Hon Tom Stephens MLC, Minister for Local Government and Regional Development, October 21 2002; Department of Local Government and Regional Development, *White Paper*, Local Government (Official Conduct) Amendment Bill, Public Submission Paper, December 2003.

2.12 An instrument of subsidiary legislation will go beyond the power of the primary Act if it does not come *"…within the scope of what the Parliament intended when enacting…*[the primary Act]*…"* and if it reveals *"…a different means for carrying out the purposes of the Act into effect…"*.[6]

2.13 Rather than providing for the matters expressed in sections 41, 43 and 62 of the *Bush Fires Act 1954*, such as the appointment of a captain, in the text of the local law itself, this local law provides for these matters by incorporating by reference 'the Rules', which would supposedly prescribe the relevant matters. As such, the Committee believed that the local law fails to provide for the relevant matters in a manner that is authorized or contemplated by the *Bush Fires Act 1954.*

2.14 The Committee received a written undertaking from the Shire of Plantagenet that it would incorporate, as soon as possible, the full text of the Rules into the local law, and that it would not attempt to enforce the Rules in the meantime.

3 DOG LOCAL LAWS

Power to Seize Unregistered Dogs - Application for a Warrant

City of Cockburn (Local Government Act) Local Laws 2000

3.1 On November 25 2003, the City of Cockburn published in the *Government Gazette* a local law to amend its *City of Cockburn (Local Government Act) Local Laws 2000* in order to provide for:

- the seizure of unregistered dogs under a warrant; and
- minor structural changes to the principal local law.

3.2 The newly inserted clause 3.0 allows for an authorized person to apply for a warrant to seize a dog that they believe to be unregistered. This assumes that a justice of the peace can grant a warrant to seize an unregistered dog. The application can be made only after three infringement notices have been issued. After seizure, the dog is to be impounded. If it remains unregistered, or if no objection or appeal has been lodged, then after seven days, the dog may either be rehoused or humanely destroyed.

3.3 Section 15(1) of the *Justices Act 1902* provides that:

> *Justices of the Peace shall have and may exercise within and for their jurisdiction the several powers and authorities conferred upon them by this Act, or any other Act…*

[6] *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at paragraph 56.

3.4 Having considered the *Justices Act 1902* and other Acts, the Committee is of the view that justices of the peace cannot generally grant warrants to seize dogs purely because the dogs are unregistered.

(a) The Act

3.5 Under the Act, a local government can impound goods (including animals) if those goods are involved in a contravention of regulations or local laws that are made under the Act.[7] Further, the contravention can only lead to the impounding of goods if:

- the presence of the goods presents a hazard to public safety or obstructs the lawful use of any place; or
- the goods are located in a place contrary to the regulation or local law.[8]

3.6 The impoundment provisions of the Act cannot be relied on to impound unregistered dogs because the registration of dogs is governed by the *Dog Act 1976*, not regulations or local laws made under the Act. Further:

- an unregistered dog, in itself, cannot be said to present a hazard to public safety or obstruct the lawful use of any place; and
- the mere failure to register a dog does not also mean that the dog is located in a place contrary to regulations or local laws made under the Act.

As neither of these situations applies, it is the Committee's view that the impoundment provisions of the Act cannot be accessed.

(b) *Dog Act 1976*

3.7 The only provision in the *Dog Act 1976* that contemplates the seizure of dogs is section 29. That section only authorizes the seizure of dogs where:

- the dog has attacked;[9]
- the dog is found in a place where dogs are prohibited;[10] or
- the dog is a 'dangerous dog'[11], and:

---

7 See section 3.39 of the Act and regulation 29 of the *Local Government (Functions and General) Regulations 1996.*

8 Regulation 29 of the *Local Government (Functions and General) Regulations 1996.*

9 Section 29(3)(a) of the *Dog Act 1976.*

10 Section 29(3)(b) of the *Dog Act 1976.*

11 As declared by the local government pursuant to section 33E of the *Dog Act 1976*.

(a) the dog is unregistered;[12]

(b) it is associated with moneys that are due to the local government under section 33M;[13] or

(c) an attack by the dog has or may have caused injury or damage.[14]

3.8 Section 7(1) of the *Dog Act 1976* already provides a penalty of $500[15] for failing to register a dog, and in addition to that penalty, the court can order the outstanding registration fee to be paid. However, that section does not also contemplate the seizure of the dog in question; that is, there does not appear to be a provision in the *Dog Act 1976* that authorizes the seizure of a dog purely because it is unregistered.

3.9 The Committee considered that the power to apply for a warrant under clause 3.0 is illusory because, in its view, there is no authority for a justice of the peace to issue a warrant to seize a dog purely because it is unregistered. The Committee therefore resolved not to take this matter further.

Unauthorized Penalties

Shire of Coorow Dogs Local Law

3.10 The *Shire of Coorow Dogs Local Law* incorporates by reference the *Shire of Moora Dogs Local Law* with some amendments. Clause 4.4 of the local law inserts a penalty provision into clause 3.2(2) of the adopted local law. The penalties relate to the keeping of dogs in excess of the maximum number prescribed by the local law, and are as follows:

> ***Penalty:*** *Where the dog is a dangerous dog, $250 per dog exceeding approved number to be kept; otherwise $100 per dog exceeding approved number to be kept.*

3.11 Section 50(2) of the primary Act, the *Dog Act 1976*, only authorizes local laws to impose penalties of up to $2,000 for a breach of the local laws.

3.12 Under the Committee's interpretation of clause 3.2(2), keeping a number of dogs in excess of the allowed maximum amounts to one breach of the local law, regardless of how many excess dogs are kept; for example, where two excess dogs are kept, the penalty of $200 would relate to only one breach of the local law rather than two. The Committee is concerned that, where the number of dogs kept in excess of the allowed

---

12 Section 29(3)(c)(i) of the *Dog Act 1976.*

13 Section 29(3)(c)(ii) of the *Dog Act 1976.*

14 Section 29(5a) of the *Dog Act 1976.*

15 Or $1,000 if the dog is a 'dangerous dog': section 7(1) of the *Dog Act 1976.*

maximum is large, the total penalty for each contravention may well exceed $2,000. In the case of dangerous dogs, the property owner only needs to keep four dogs in excess of the allowed maximum to be fined up to $2,500 by a court.

3.13 The Committee considered that clause 3.2(2) of the adopted local law, as amended by clause 4.4 of this local law, has the potential to be inconsistent with section 50(2) of the *Dog Act 1976*. It would therefore be void to the extent of any inconsistency pursuant to section 43(1) of the *Interpretation Act 1984*.

3.14 The Shire of Coorow has indicated to the Committee that it will be recommended to the council that clause 4.4 of this local law be deleted.

4 DETERMINATION MAKING POWERS

4.1 The problems associated with local laws that provide the local government with 'determination making powers' has been explored in the Committee's Fourth Report at pages 49 to 51, and the Committee maintains the position espoused in that Report.

4.2 In summary, the Committee considers that determinations are an unlawful subdelegation of local government law making power that avoid parliamentary and ministerial scrutiny, contrary to the Act and the *Interpretation Act 1984.* The Committee will continue to recommend the disallowance of local laws that:

- add to, and expand upon, the heads of power listed in clauses 2.7 and 2.8 of the Western Australian Local Government Association (**WALGA**) *pro forma Local Government Property Local Law*; and/or
- extend the use of determinations to local laws other than local government property local laws.

4.3 During this reporting period, each of the following local laws was found to have transgressed the Committee's position on determination making powers:

- Clause 5.1 of the *Shire of Broome Local Government Property and Public Places Local Law 2003*.
- Clauses 3.1 and 8.23(1) of the *City of Bunbury Local Government and Public Property Local Law.*
- Clause 78 of *The Town of Victoria Park Health Local Law 2003*.

4.4 All of these local laws either added to or expanded upon the 'heads of power' that are acceptable to the Committee. *The Town of Victoria Park Health Local Law 2003* also extended the use of determinations into health local laws.

4.5 The Committee noted, in the case of the *Shire of Broome Local Government Property and Public Places Local Law 2003* and the *City of Bunbury Local Government and Public Property Local Law*, that the local laws did not provide for a procedure for making determinations. Clause 2.2 of the WALGA *pro forma Local Government Property Local Law* provides such a procedure, which, if adopted, would ensure that the local government consults the public when proposing to make or amend a determination. Clause 2.5 of the *pro forma*, if adopted, would oblige the local government to keep a register of the determinations that it makes, and to provide the public with a copy of that register upon request. Both clauses 2.2 and 2.5 are contained in Part 2 Division 1 of the *pro forma.* The Committee considers that these obligations should accompany any powers to make determinations.

4.6 All three local governments provided the Committee with written undertakings to make the necessary changes to their respective local laws.

5 LOCAL GOVERNMENT PROPERTY LOCAL LAWS

Unauthorized Reversal of Onus of Proof

Shire of Boyup Brook Local Government Property Local Law

5.1 The *Shire of Boyup Brook Local Government Property Local Law* incorporates by reference the *Shire of Exmouth Local Government Property Local Law* with some amendments. Clause 8.4(2) of the adopted local law provides as follows:

> *Unless there is proof to the contrary, a person is to be taken to have damaged local government property within subclause (1) where —*
>
> *(a) a vehicle or a boat caused the damage, the person was the person responsible, at the time the damage occurred, for the control of the vehicle or the boat; or*
>
> *(b) the damage occurred under a permit, the person is the permit holder in relation to that permit.*

5.2 Under common law, it is ordinarily the duty of the prosecution in a criminal matter, or the plaintiff in a civil matter, to prove all of the elements of the offence (criminal)[16] or the cause of action (civil)[17] in order to make out the case against the other party. This is known as the burden or onus of proof. The other party is generally not required to prove anything until the prosecution or the plaintiff has proved all elements of the offence or the cause of action to the required standard.

---

16 *Woolmington v DPP* [1935] AC 462 at 481; *R v Falconer* (1990) 171 CLR 30.

17 For example, *Munce v Vinidex Tubemakes Pty Ltd* [1974] 2 NSWLR 235.

5.3 Clause 8.4(2) reverses the burden of proving that a particular person caused damage to local government property because it deems the person who had control over the vehicle or boat or the permit holder to be the person responsible for the damage. That is, a person who falls under category (a) or (b) would be forced to shoulder the onus of proof; that is, that person will then be faced with the obligation of proving that they were not the person who caused the damage to the local government property.

5.4 It is settled law that, when interpreting statutes, common law doctrines will not be altered by statute unless there are clear and express words to show that the Parliament had intended to do so.[18] This presumption extends to subsidiary legislation, so that where an instrument of subsidiary legislation attempts to depart from common law principles, it will be invalid unless there is clear authority in an empowering Act to the contrary.[19]

5.5 Section 9.13 of the Act does reverse the burden of proof, but only where a 'vehicle offence' is alleged to have been committed under the Act or subsidiary legislation made under the Act. 'Vehicle offence' is defined in section 9.13(1) of the Act as:

> *…an offence against this Act of which the use, driving, parking, standing or leaving of a vehicle is an element.* (emphasis added)

5.6 In the Committee's view, clause 8.4(2) of the local law is not authorized or contemplated by section 9.13 of the Act because:

- it is not confined to damage that is caused by a vehicle; and
- even where it relates to damage caused by a vehicle, clause 8.4(2):
  - (a) deals mainly with civil liability, not criminal offences; and
  - (b) deems the person liable for local government property damage to be the person who had control of the vehicle at the time, not the owner of the vehicle as is contemplated by section 9.13 of the Act.

5.7 The Committee notes that clause 8.4(2) is equivalent to the now deleted clause 10.2 of the WALGA *pro forma Local Government Property Local Law*. The reasons for that deletion are discussed at section 2 - page 213 of the October 2003 version of the WALGA Local Laws Manual.

---

[18] *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 43 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at 49 per McHugh J, and at 65-66 per Callinan J; *Coco v R* (1994) 120 ALR 415 at 419; *Bropho v State of Western Australia* (1990) 93 ALR 207 at 215; *Potter v Minahan* (1908) 7 CLR 277 at 304.

[19] Pearce, D & Argument, S, *Delegated Legislation in Australia*, 2nd Ed, Butterworths, Sydney, 1999, p 137, citing for example, *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400; *Willoughby Municipal Council v Homer* (1926) 8 LGR 3; *Ex parte Aston Investments Pty Ltd Re Hall* [1960] SR (NSW) 620; and *Willcocks v Anderson* (1970) 124 CLR 293.

5.8 The Committee received a written undertaking from the Shire of Boyup Brook that it would amend this local law as soon as possible by deleting clause 8.4(2) of the adopted local law.

6 PARKING AND PARKING FACILITIES LOCAL LAWS

Inconsistency with another Written Law

WALGA pro forma Parking and Parking Facilities Local Law

6.1 During this reporting period, the Committee encountered three problematic clauses in the *WALGA pro forma Parking and Parking Facilities Local Law* when it reviewed the *pro forma* in an effort to locate the source of the same issues found in various parking local laws[20] that had been published in the *Government Gazette*. Those gazetted local laws relied on the local law making power provided in section 3.5 of the Act.

(a) Clauses 4.5(2)(e) and (k) of the pro forma

6.2 Clauses 4.5(2)(e) and (k) of the *pro forma* provide, respectively, as follows:

> *(2) A person shall not park a vehicle so that any portion of the vehicle is:*
>
> …
>
> *(e) on or within 10 metres of any portion of a carriageway bounded by a traffic island;*
>
> …
>
> *(k) within 10 metres of the nearer property line of any thoroughfare intersecting the thoroughfare on the side on which the vehicle is parked,*
>
> *unless a sign or markings on the carriageway indicate otherwise.*

6.3 The Committee considered that the equivalent clauses in the gazetted local laws are inconsistent with regulation 143(2) of the *Road Traffic Code 2000* (**the Code**), which provides that there must be at least 20 metres between a parked vehicle and a traffic light situated on the same carriageway:

---

[20] Such as the *City of South Perth Parking Local Law*, *City of Wanneroo Parking and Parking Facilities Local Law 2003*, *Shire of Boyup Brook Parking and Parking Facilities Local Law*, and the *City of Bayswater Parking and Parking Facilities Local Law.*

> *A person shall not stop a vehicle on a carriageway within 20 m from the nearest point of an intersecting carriageway at an intersection with traffic-control signals, unless the driver stops at a place on a length of carriageway, or in an area, to which a parking control sign applies and the driver is permitted to stop at that place under these regulations.*

6.4 Clauses 4.5(2)(e) and (k) of the *pro forma* do not differentiate between intersections that do and do not contain traffic lights. In the Committee's view, they incorrectly imply that it is lawful to park a vehicle within say, 12 metres from the nearest traffic light intersection. It was the Committee's view that the equivalent clauses in the gazetted local laws would be inoperative and void to the extent of their inconsistency with regulation 143(2) of the Code pursuant to section 3.7 of the Act and section 43(1) of the *Interpretation Act 1984.*

6.5 The Committee recognizes that regulation 8 of the Code contemplates that local laws can be made to regulate subject matters that overlap with the scope of the Code. However, the Committee considers that it could not have been the intention of the Parliament, when enacting section 3.5 of the Act, for that section to be used by different local governments to make local laws that imposed different stopping distances to those imposed in other local government districts.

(b) Clause 10.2 of the pro forma

6.6 Clause 10.2 of the *pro forma* provides that:

> *An averment on a complaint that this Local Law applies to a parking facility or a parking station under an agreement referred to in clause 1.5(2)* [a private parking agreement], *shall be sufficient proof that this Local Law applies to that facility or station, unless there is proof to the contrary that such an agreement does not exist.*

6.7 The clause deems that a mere averment or assertion that the parking local law applies to the private land under a private parking agreement is sufficient proof of that application, unless there is proof that the agreement does not exist. The Committee's discussion at paragraphs 5.2 to 5.6 on the common law onus of proof and the implications of section 9.13 of the Act are relevant here.

6.8 The equivalent clauses in the gazetted local laws reverse the burden of proving that a valid private parking agreement exists. In prosecuting a parking offence under one of the gazetted local laws, the local government merely has to assert that, under a private parking agreement, the parking local law applies to the relevant private land before the accused is required to disprove the existence of the agreement to establish his or her innocence.

6.9 Section 9.13 of the Act does not authorize the making of a clause that is equivalent to clause 10.2 of the *pro forma*. Section 9.13 only reverses the burden of proving the identity of the person who committed the offence; it does not reverse the burden of proving the existence of a valid private parking agreement. In the Committee's view, the clauses in the gazetted local laws that are equivalent to clause 10.2 of the *pro forma* would not be authorized nor contemplated by the Act.

6.10 The Committee has notified the WALGA of these issues. In relation to the gazetted local laws that adopted the problematic clauses in the *pro forma*:

- The local governments have provided the Committee with a written undertaking to refrain from relying upon the clauses that are equivalent to clause 10.2 of the *pro forma* while the issues are still being resolved with the WALGA.

- The Committee did not request a similar undertaking in relation to the clauses that are equivalent to clauses 4.5(2)(e) and (k) of the *pro forma*.

7 STANDING ORDERS LOCAL LAWS

Unauthorized and Unconstitutional Exclusion of Councillors from Meetings

City of Nedlands Standing Orders Local Law

7.1 The Committee encountered numerous problems with the *City of Nedlands Standing Orders Local Law*, one of which has already been discussed at paragraphs 2.2 to 2.6. Clause 53(1) will be examined here as a sample of the issues that the Committee brought to the City of Nedlands' attention.

7.2 Clause 53(1) provides as follows:

> *If the Councillor thereafter continues to interrupt proceedings, the Council may by motion, which may be moved without notice, exclude that Councillor from the Council Chamber for a period of time stipulated but not exceeding the duration of the meeting.*

7.3 While the Committee believes that it is a legitimate public purpose to ensure that continually disruptive members do not frustrate the transaction of a council's business, it does not believe that it is reasonable to achieve that purpose through the total exclusion of a disruptive member from the meeting.

7.4 The Committee considered that this clause is inconsistent with, and not authorized nor contemplated by, the Act. It also considered the clause to be unconstitutional. The Committee's comments at pages 18 to 23 and 29 to 32 in its Fourth Report and at pages 3 to 4 in its Eighth Report are relevant here.

7.5 The City of Nedlands provided a written undertaking to amend, among other clauses, clause 53(1) so that councillors can only be prevented from participating in debate (but without losing their right to cast votes) for a period of time not exceeding the remaining duration of the meeting.

8 ADVERTIZING SIGNS LOCAL LAWS

Unauthorized Power of Entry and Ouster Clause

Shire of Busselton Local Law Relating to Signs and Other Advertising Devices

8.1 Clause 39 of the *Shire of Busselton Local Law Relating to Signs and Other Advertising Devices* allows the Shire to enter onto private land to remove, without liability,[21] an advertizing device that contravenes this local law, or in the opinion of the Shire, is dangerous or objectionable. The Shire is then authorized to store the removed device, dispose of it, and recover the costs of the storage and disposal from the owner or occupier of the private land. Clause 39.2 provides some restrictions on this power of entry; for example, the owner or occupier must be given at least two days' notice of the entry unless there is an emergency.

8.2 As explained in the Committee's seventh Report[22], the Act only authorizes local governments to enter onto private land under a warrant,[23] an emergency,[24] or pursuant to section 3.25 and Schedule 3.1, or section 3.27 and Schedule 3.2 of the Act. As:

- clause 39 does not require the Shire to obtain a warrant;
- a non-compliant advertizing sign, of itself, would not necessarily be an emergency; and
- the removal of non-compliant advertizing devices is not listed in either Schedule 3.1 or 3.2 of the Act,

the Committee considered that clause 39 is not authorized nor contemplated by, and is inconsistent with, the Act. In the Committee's view, clause 39.2 is not necessary as notice of entry requirements and entry in emergencies is already provided for in sections 3.32 and 3.34 of the Act, respectively.

---

21 Clause 39.1(a) of this local law.

22 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in Relation to the Powers of Entry and Powers to make Local Laws that Affect Private Land under the Local Government Act 1995,* Report Number 7, May 2003.

23 Section 3.33 of the Act. See Form 6 in Schedule 1 of the *Local Government (Functions and General) Regulations 1996* for the form of the warrant.

24 Section 3.34 of the Act.

8.3 Further, in the Committee's view, clause 39.1(a) is an unauthorized ouster clause.[25] Such clauses were discussed by the Committee at pages 17 to 19 in its sixth Report[26] (**Sixth Report**) and at pages 9 to 10 of the Department of Local Government and Regional Development's Local Laws Circular No 10-2003.

8.4 The Shire of Busselton undertook in writing to delete clause 39 as soon as possible.

Inconsistency with the Act

Shire of Busselton Local Law Relating to Signs and Other Advertising Devices

8.5 Clause 40.1 of this local law authorizes the Shire's council to:

> *…delegate to any of the Shire's employees or officers…the exercise of any of its powers or the discharge of any of its duties under this Local Law, <u>including this power of delegation.</u>* (emphasis added)

8.6 The delegation of a Council's powers is dealt with by the Act at sections 5.42, 5.43 and 5.44. Those sections expressly provide that the power to delegate is itself unable to be delegated. As it stands, clause 40.1 is inconsistent with the Act and is inoperative to the extent of that inconsistency pursuant to section 3.7 of the Act and invalid pursuant to section 43(1) of the *Interpretation Act 1984.*

8.7 The Shire of Busselton undertook in writing to amend clause 40.1 as soon as possible by deleting the words, 'including this power of delegation'.

9 STREET TRADING LOCAL LAWS

Unauthorized Ouster Clauses

Shire of Broome Trading, Outdoor Dining and Street Entertainment Local Law 2003

9.1 The *Shire of Broome Trading, Outdoor Dining and Street Entertainment Local Law 2003* contains two examples of unauthorized ouster clauses:[27]

- Clause 3.8.1(h) states that the licensee shall:

  > *pay all and any costs associated with the alteration, removal, repair, reinstatement, or reconstruction of all or part of the approved outdoor dining area arising from any works proposed or done in the area or rest of the public place by or on behalf of a Government*

[25] 'Ouster clauses' are so referred to because they seek to oust the jurisdiction of courts to hear claims or review decisions of inferior courts or tribunals.

[26] Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report Number 6, March 2003, pp17-19.

[27] Please refer to footnote number 25 for a definition of 'ouster clause'.

department, instrumentality of the Crown or the local government and shall not have any claim for compensation or damages as a result of any disruption to business or loss incurred due to such works.

- Clause 8.3 states that:

  A licensee, or other person is not entitled to make any claim by way of damages or otherwise arising out of any works carried out under clause 8.1 or 8.2 as against the local government, an authorized person, local government employee, local government appointed subcontractor or other person authorized by the local government to carry out all or part of the works.

9.2 The Committee again refers to pages 17 to 19 of the Sixth Report and pages 9 to 10 of the Department of Local Government and Regional Development's Local Laws Circular No 10-2003, for relevant discussions of ouster clauses.

9.3 The Committee notes that clause 3.8.1(h) also appears to absolve the State Government from liability for any disruption to business or other losses incurred due to the works. In the Committee's view, that clause breaches its term of reference 6.6(f), as it deals with a matter that would more appropriately be dealt with in an Act passed by the State Parliament.

9.4 The Shire undertook in writing, among other things, to amend, as soon as possible:

- clause 3.8.1(h) so as to remove the Shire and the State Government's protection from tortious liability; and

- clause 8.3 so as to remove the Shire's protection from liability.

10 LOCAL LAW MAKING REQUIREMENTS OF THE ACT

Local Law Significantly Different from what was Proposed

Shire of Boddington Local Laws relating to Pest Plants

10.1 In the process of scrutinizing the *Shire of Boddington Local Laws relating to Pest Plants*, the Committee was advised by the Shire that, despite the fact that Prickly Lettuce appears as a prescribed pest plant in the gazetted version of the local law, it was not identified as a prescribed pest plant when the local law was first proposed and advertized.

10.2 The Committee considered the effect of section 3.12(4) of the Act, which provides that:

> *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.*

10.3 The Committee also considered section 3.13 of the Act:

> *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.*

10.4 The Committee acknowledged that the difference between the proposed and gazetted versions of the local law is minor in form. Unfortunately, as one of the main purposes of the local law is to prescribe pest plants for the Shire's district, the Committee considered that the proposed version of the local law, as it was notified in the first newspaper advertizement, is significantly different to the local law that was ultimately made.

10.5 In the Committee's view, according to section 3.13, the local law making process provided for in section 3.12 of the Act should be recommenced with the 'correct' version of the local law. The Shire of Boddington provided a written undertaking to this effect and also undertook not to enforce the local law in the meantime. If this process does not occur, the Committee believes that the validity of the whole local law could be challenged.

11 DRAFTING ERRORS

11.1 The Committee continues to find drafting errors that should be avoided with careful proof reading. While most drafting errors are benign, the following discussion illustrates how some drafting errors, which are simple in form, have important legal consequences.

Non-Effective Repeal of Old Local Laws

11.2 In its Eighth Report, the Committee commented on drafting errors that result in the non-effective repeal of old local laws.[28] The Committee again encountered numerous examples of this form of drafting error in this reporting period. For example, clause 2(p) of the *Shire of Northampton Local Law to Repeal Defunct and Obsolete Local Laws* refers to *"6 August 1985"* when the correct date of gazettal is August 16 1985.

[28] Please refer to p18 of the Eighth Report.

Non-Effective Adoption of Another Local Law or a pro forma Local Law

Shire of Sandstone Public Cemetery Local Law 2003 and Shire of Sandstone Standing Orders Local Law

11.3 The *Shire of Sandstone Public Cemetery Local Law 2003* seeks to adopt the Governor's *Model Local Law (Cemeteries) 1998* published in the *Government Gazette* on May 12 1998 (**Governor's Cemeteries Model**). The enacting formula of the local law states as follows:

> *Under the powers conferred by the* Cemeteries Act 1986, *the Shire of Sandstone resolved on the 21st day of May 2003 to adopt the Model Local Law (Cemeteries) 1998 published in the* Government Gazette *on 12 May 1998 in relation to the Sandstone Public Cemetery, with such modifications as are here set out.*

11.4 The enacting formula does not form a part of local laws and has no effect on the meaning of local laws. As it stands, this local law does not appear to have any substantive clauses that adopt the Governor's Cemeteries Model. The only mention of the adoption of the Governor's Cemeteries Model is in this local law's enacting formula. As such, the Committee considers that it could be argued that, in the case of this local law, there has not been an effective adoption of the Governor's Cemeteries Model.

11.5 The *Shire of Sandstone Standing Orders Local Law* seeks to adopt, in the same way as set out above, the Governor's *Model Local Law (Standing Orders) 1998* published in the *Government Gazette* on April 3 1998. After the Committee indicated its concerns regarding these two local laws, the Shire provided the Committee with a written undertaking to rectify the matters.

Failing to Remove Drafting Instructions when Adopting a Governor's Model Local Law

11.6 Section 3.9 of the Act authorizes the Governor to prepare and publish in the *Government Gazette* model local laws. These model local laws:

- may be adopted by reference by local governments, either with or without modifications; and
- have no legal effect except to the extent that they are adopted by a local government.

11.7 One example of a Governor's model local law is the Governor's Cemeteries Model. Like many other *pro forma* local laws, the Governor's Cemeteries Model provides drafting instructions to local governments that are intending to adopt it. For example, clause 1.1 of the Governor's Cemeteries Model reads as follows:

> *This* **[insert "Local Law" or "By-law" as applicable]** *may be cited as* **[insert name of Local Law or By-law] [insert year].**

11.8 The text in the square brackets appear to be drafting instructions that are designed to prompt a local government to designate whether it is making a local law or a by-law,[29] and to provide the instrument with a title.

11.9 The problems encountered by the Committee arise where the local government adopts the Governor's Cemeteries Model by reference to its title and its date of publication in the *Government Gazette*, rather than by replicating the full text of the Governor's Cemeteries Model. When the adoption by reference method is used, the local government is effectively adopting the Governor's Cemeteries Model word for word as it appears in the *Government Gazette* on May 12 1998. That would include the text of the drafting instructions. For example, if clause 1.1 of the Governor's Cemeteries Model was adopted by reference without any modifications, clause 1.1 of the local government's local law would read as follows:

> *This* **[insert "Local Law" or "By-law" as applicable]** *may be cited as* **[insert name of Local Law or By-law] [insert year].**

11.10 Many local governments that adopt by reference the Governor's Cemeteries Model fail to remove the drafting instructions and many of them also fail to insert the information that the drafting instructions are prompting them to insert. The following table provides an example of what can occur when a local government adopts the Governor's Cemeteries Model without removing the drafting instructions and inserting text in place of those drafting instructions. The example is taken from the *Shire of Sandstone Public Cemetery Local Law 2003*.

Clause	Incorrect Phrase	Correct Phrase
1.1 of the Governor's Cemeteries Model	This ***[insert "Local Law" or "By-law" as applicable]*** may be cited as…	This Local Law may be cited as…
1.2 of the Governor's Cemeteries Model	In this ***[insert "Local Law" or "By-law" as applicable]*** unless the context otherwise requires:	In this Local Law unless the context otherwise requires:
1.2 of the Governor's Cemeteries Model in the definition of "authorised officer"	…upon an authorised officer by this ***[insert "Local Law" or "By-law" as applicable]***;	…upon an authorised officer by this Local Law;

[29] Since the commencement of the Act on July 1 1996, the legislation made by local governments is referred to as 'local laws'.

Clause	Incorrect Phrase	Correct Phrase
1.4 of the Governor's Cemeteries Model	The following ***[insert "Local Law" or "By-law" as applicable]*** is repealed:-	The following Local Law is repealed:-
5.1(a) of the Governor's Cemeteries Model	…Part 3 of this ***[insert "Local Law" or "By-law" as applicable]***;	…Part 3 of this Local Law;
5.6(f) of the Governor's Cemeteries Model	…required under this ***[insert "Local Law" or "By-law" as applicable]***;	…required under this Local Law;
7.11 of the Governor's Cemeteries Model	Notwithstanding anything in this ***[insert "Local Law" or "By-law" as applicable]***…	Notwithstanding anything in this Local Law…
8.8 of the Governor's Cemeteries Model	…any provisions of this ***[insert "Local Law" or "By-law" as applicable]*** or behaving…provided by this ***[insert "Local Law" or "By-law" as applicable]*** be ordered…	…any provisions of this Local Law or behaving…provided by this Local Law be ordered…
9.1 of the Governor's Cemeteries Model	…any provisions of this ***[insert "Local Law" or "By-law" as applicable]***…	…any provisions of this Local Law…

12 DRAFTING ADVICE FROM THE COMMITTEE

12.1 Throughout this reporting period, the Committee has received several requests from local governments to approve their draft local laws. In many instances, the draft local law has been prepared in order to satisfy an undertaking that the local government provided to the Committee. Other requests relate to drafts that will become inaugural local laws.

12.2 The Committee recognizes the initiative of these local governments and their desire to eliminate potential problems before they expend considerable time and resources in commencing the formal local law making procedures, which include newspaper advertizing and publication in the *Government Gazette*. However, the Committee is unable to offer this approval facility to local governments as it amounts to drafting advice. The Committee's terms of reference only authorize it to scrutinize local laws that have been made and published in the *Government Gazette*. That is, the role of the Committee, as an arm of the legislature, is purely one of review.

12.3 It is suggested that local governments should seek drafting advice from solicitors, the Department of Local Government and Regional Development and/or the WALGA, in order to ensure that the proposed local law:

- will properly honour the undertaking that was provided to the Committee; or

- will not offend the Committee's terms of reference.

13 CONCLUSION

13.1 The Committee observes that, on the whole, local governments are keen to ensure that the correct local law making procedures prescribed in the Act are adhered to and that their local laws do not offend the Committee's terms of reference. However, the Committee remains concerned that some local governments continue to approach their local law making function with the belief that they have plenary law making powers.

Mr Martin Whitely MLA
Chairman

Date: August 26 2004