



THIRTY-EIGHTH PARLIAMENT

REPORT 51

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***TOWN OF BASSENDEAN REPEAL LOCAL LAW 2010
AND TOWN OF BASSENDEAN DUST AND SAND
LOCAL LAW 2011***

Presented by Hon Sally Talbot MLC (Deputy Chair)

and

Mr Paul Miles MLA (Member)

August 2012

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed

28 June 2001

Terms of Reference

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

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 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.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 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.
- 3.5 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.
- 3.6 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;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 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 inquiry

Mr Joe Francis MLA (Chairman)

Hon Sally Talbot MLC (Deputy Chair)

Hon Alyssa Hayden MLC

Ms Janine Freeman MLA

Mr Andrew Waddell MLA

Mr Paul Miles MLA

Hon Jim Chown MLC

Hon Helen Bullock MLC

Staff as at the time of this inquiry

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Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE *TOWN OF BASSENDEAN REPEAL LOCAL LAW 2010* AND *TOWN OF
BASSENDEAN DUST AND SAND LOCAL LAW 2011*

REPORT

EXECUTIVE SUMMARY

- 1 Section 3.12(1) of the *Local Government Act 1995* (**Act**) states that in making a local law a local government is to follow the procedure in section 3.12, in the sequence in which it is described.
- 2 The Joint Standing Committee on Delegated Legislation (**Committee**) has identified that the Town of Bassendean did not follow the correct procedure described in the Act when it made its *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011* (**two Local Laws**).
- 3 The Town of Bassendean failed to follow the sequential steps outlined in section 3.12(3)(b) of the Act, which has resulted in the two Local Laws being invalid. The two Local Laws are not authorised by the Act and therefore offend the Committee's *Term of Reference* 3.6(a).
- 4 The Committee recommends the House disallow the Town of Bassendean's two Local Laws.

RECOMMENDATIONS

- 5 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Minister for Local Government amend the *Local Government Act 1995* to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of a local law.

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Recommendation 2: The Committee recommends that the *Town of Bassendean Repeal Local Law 2010* be disallowed.

Recommendation 3: The Committee recommends that the *Town of Bassendean Dust and Sand Local Law 2011* be disallowed.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE *TOWN OF BASSENDEAN REPEAL LOCAL LAW 2010* AND *TOWN OF BASSENDEAN DUST AND SAND LOCAL LAW 2011*

REPORT

1 REFERRAL TO THE COMMITTEE

- 1.1 The *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011* (**two Local Laws**) fall within the definition of ‘Instrument’ in the *Terms of Reference* of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The two Local Laws were referred to the Committee upon publication in the *Western Australian Government Gazette*. Their full text is publicly available from the State Law Publisher’s website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.¹

2 BACKGROUND

- 2.1 The Town of Bassendean (**Town**) resolved to commence the process of making a:
- Repeal Local Law 2010 at its meeting on 14 December 2010; and
 - Dust and Sand Local Law 2011 at its meeting on 8 March 2011.
- 2.2 The procedure for making a local law is outlined in section 3.12 of the Act and is replicated at **Appendix 1**.

3 SCRUTINY OF THE PROCEDURE FOR MAKING THE LOCAL LAW

- 3.1 The Committee first scrutinised the Repeal Local Law 2010 on 30 April 2012 and the Dust and Sand Local Law 2011 on 14 May 2012. The Town provided a *Statutory Procedures Checklist* for each Instrument which indicated non-compliance with section 3.12(3)(b) of the Act. That sub-section requires that:

The local government is to –

... as soon as the [Statewide public] notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if

¹ The Repeal Local Law 2010 was gazetted on 20 January 2012. The Dust and Sand Local Law 2011 was gazetted on 6 March 2012.

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

- 3.2 According to sections 1.7 and 1.8 of the Act, ‘Statewide public notice’ requires a notice to be published in a newspaper circulating generally throughout the State, exhibition of the notice to the public on a notice board at the local government’s offices and to the public at every local government library in the district. All three elements of Statewide public notice must be completed in order for the notice to be effective.
- 3.3 The *Statutory Procedures Checklist* for the Town’s Repeal Local Law 2010 indicated that Statewide public notice was published in *The West Australian* on 29 March 2011 with the Minister given a copy of the proposed Instrument and a copy of the Statewide public notice on 25 March 2011.
- 3.4 The *Statutory Procedures Checklist* for the Town’s Dust and Sand Local Law 2011 indicated that Statewide public notice was published in *The West Australian* on 30 March 2011 with the Minister given a copy of the proposed Instrument and a copy of the Statewide public notice on 25 March 2011.
- 3.5 The Committee sought confirmation of the accuracy of the information in each *Statutory Procedures Checklist*. On 9 May 2012, the Town advised that according to Department of Local Government records, the Minister received the requisite information on 29 March 2011 and State-wide public notice was given a day later on 30 March 2011. However, the Act requires that the Town should have proceeded in the reverse manner; that is, Statewide public notices should have been given first (pursuant to 3.12(3)(a)) and then the Minister given copies of the Statewide public notices and the proposed local laws, pursuant to 3.12(3)(b).
- 3.6 The Town acknowledged that the procedure in section 3.12(3) of the Act for the two Local Laws had not been sequentially followed. This procedural defect has resulted in the Committee forming a view that the two Local Laws are unauthorised by the Act because the wording of section 3.12(3)(b) expressly uses the words “*as soon as the [Statewide public] notice is given*”, which requires notification be sent to the Minister only after the Statewide public notices have been given.
- 3.7 A copy of the Town’s response to the Committee’s letters regarding the Repeal Local Law 2010 and the Dust and Sand Local Law 2011 is replicated at **Appendices 2** and **3** respectively.

4 NON-COMPLIANCE WITH SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

Disallowance of an invalid local law - the Committee's position

- 4.1 The Committee has previously stated its position on the status of invalid local laws and the prospect of disallowance on four other occasions in its:
- 42nd report: *Town of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and *Town of Koorda Standing Orders Local Law 2009*;²
 - 45th Report: *Shire of Kellerberrin Dogs Local Law*;³
 - 47th Report: *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;⁴ and
 - 48th Report: *Town of Kwinana Extractive Industries Local Law 2011*.⁵
- 4.2 These two Local Laws raise the same issues in relation to the effect of not complying with the procedure in section 3.12 of the Act and the Committee notes that a failure to comply with the requirements of the section will result in a local law being found to be invalid.
- 4.3 As stated previously, an Instrument stands referred to the Committee at the time of gazettal. Upon the tabling of a local law, there is an Instrument which may be subject to disallowance and the Parliament has the power to disallow a local law tabled before it.⁶
- 4.4 In the Committee's view, tabled instruments that have not been correctly made by following the prescribed statutory method are not excluded from that power to disallow.

² 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 2010. These two local laws raised the same issue for the Committee in that both Instruments were gazetted in error. In each case, the Instrument gazetted was not the one adopted by the Shire Council or subject to the procedure set out under section 3.12 of the *Local Government Act 1995*.

³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 45, Shire of Kellerberrin Dogs Local Law*, 3 November 2011. The Committee formed the view that the local law had been invalidly made, based on non-compliance with sections 3.12(5) and (6) of the *Local Government Act 1995*. The Committee recommended that the Executive Council advise the Governor to invoke section 3.17 of the *Local Government Act 1995* to repeal the local law. This course of action was chosen because due to an administrative error, a notice of motion to disallow was not moved in the Legislative Council on the last date for disallowance: 27 September 2011.

⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012.

⁵ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

⁶ Section 42 of the *Interpretation Act 1984*.

5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW

5.1 It is important to note that section 3.12(1) of the Act is as follows:

3.12 Procedure for making local laws

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.

[Committee emphasis]

5.2 If the steps set out in section 3.12 are not followed exactly in the order in which they are outlined, then the requirements of the Act have not been met and the local law is consequentially invalid.

5.3 Long-standing advice from the then Crown Solicitor's Office (now State Solicitor's Office) in January 2002 is that the procedure in section 3.12 is mandatory. A local law which does not follow the process in the order in which it is described there will be invalid.⁷

5.4 Therefore, as the process outlined in section 3.12(3)(b) of the Act has not been followed correctly, the Committee has formed the view that the two Local Laws are invalid and capable of disallowance.

6 REVIEW OF SECTION 3.12 OF THE ACT

6.1 The Committee notes that this is the fifth occasion since September 2010 that the Committee has scrutinised a local law which has not correctly followed the mandatory sequential procedure prescribed in section 3.12(2) of the Act.

6.2 The Committee is concerned that the overly prescriptive nature of section 3.12(2) may be the cause of local laws being invalid. Local governments are clearly unaware of the legal consequences of not complying exactly with all of the steps in section 3.12(2) in the order in which they are prescribed. This was evidenced by the Town of Bassendean when it described its sequential errors as "*administrative*".⁸

6.3 Sequential errors result in significant resources and rate payer money being expended by local governments to make laws which are ultimately found to be invalid and of no legal effect. While the Committee is sympathetic to the intention of local governments when they fail to comply with the process in section 3.12(2), the Committee's *Terms of Reference* oblige it to investigate when an Instrument of

⁷ That longstanding advice dated 31 January 2002 is replicated in Appendix 4 to Report 42, 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 2010.

⁸ See the third paragraphs in **Appendices 2 and 3**.

subsidiary legislation is not made according to the requirements of its empowering statute.

- 6.4 The Committee sees a solution to this discord between a strict legal interpretation of the words of section 3.12(2) and the practical impact on the many local governments in the State which may not be aware of the effect of non-compliance with section 3.12(2) of the Act.
- 6.5 As with Report 48 regarding the *Town of Kwinana Extractive Industries Local Law 2011*,⁹ the Committee again recommends that the Minister for Local Government review the requirements of section 3.12 with a view to permitting an element of flexibility or discretion in the application of its requirements.

7 CONCLUSIONS

Term of Reference 3.6(a)

- 7.1 The Committee has concluded that the two Local Laws offend its *Term of Reference* 3.6(a) on the basis of non-compliance with a mandatory requirement in section 3.12(3)(b) of the Act. The Committee has therefore resolved to recommend that the House disallow the two Local Laws as it is of the view that they are invalid and not authorised by the Act.
- 7.2 The Committee has also concluded that there is an avenue for ensuring that this type of non-compliance (or more appropriately termed, 'substantial compliance') should not be a barrier to local laws being authorised under the Act.

Consequences of disallowance

- 7.3 As outlined in a previous report, the Committee notes that a number of benefits exist in recommending the disallowance of invalid instruments, which include ensuring that invalid laws are quickly removed from the public record and reducing the risk of public misinformation.
- 7.4 Disallowance of the *Town of Bassendean Repeal Local Law 2010* will revive the previous 11 local laws. As the *Town of Bassendean Dust and Sand Local Law 2011* is a new local law, disallowance will not revive any other local law.

8 RECOMMENDATIONS

Recommendation 1: The Committee recommends that the Minister for Local Government amend the *Local Government Act 1995* to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of a local law.

⁹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

Recommendation 2: The Committee recommends that the *Town of Bassendean Repeal Local Law 2010* be disallowed.

Recommendation 3: The Committee recommends that the *Town of Bassendean Dust and Sand Local Law 2011* be disallowed.

A handwritten signature in blue ink, appearing to read 'Sally Talbot', with a large checkmark-like flourish at the end.

**Hon Sally Talbot MLC
Deputy Chair**

16 August 2012

APPENDIX 1

SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

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.

(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;

(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;

(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;

(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.

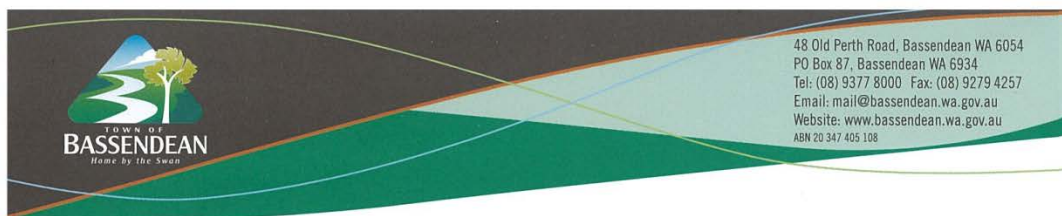
(7) *The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.*

(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 2

RESPONSE REGARDING TOWN OF BASSENDEAN *REPEAL LOCAL LAW 2010*



Our ref: OLET-3152912
LAWE/LOCLWS/2: BR
Your ref: 3883/14 and 3885/17



Advisory Officer
Delegated Legislation Committee
Legislative Council
PARLIAMENT HOUSE
PERTH WA 6000

Dear Sir/Madam

TOWN OF BASSENDEAN REPEAL LOCAL LAW 2010

I refer to your letter of 1 May 2012 regarding the above and advise that I have discussed the matter with the Department of Local Government. According to the Department's records, it appears that the letter was received by the Minister on 29 March 2011. State-wide notice was given a day later on 30 March 2011.

Whilst it is acknowledged that the two processes should have occurred in the reverse manner, as pointed out in your letter, surely the intention of the legislation is to ensure that the Minister is advised of Council's intention to make a local law without unnecessary delay.

Having regard to the above comments the Joint Standing Committee on Delegated Legislation is respectively requested not to disallow the Local Law: I fail to see how any person or organisation has been disadvantaged by my administrative error.

Should you wish to discuss any aspect of this matter further, I may be contacted on 93778005.

Yours faithfully

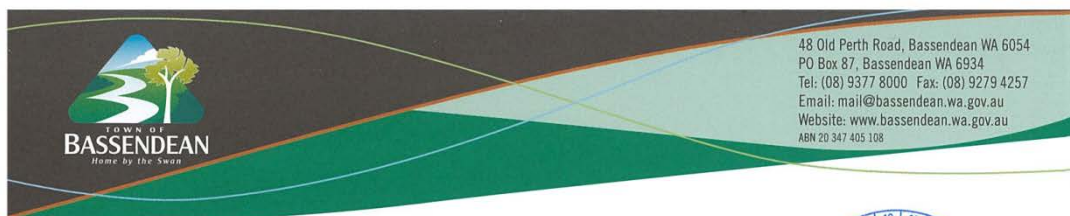
Brian Reed

BRIAN REED
MANAGER DEVELOPMENT SERVICES
09 May 2012



APPENDIX 3

RESPONSE REGARDING TOWN OF BASSENDEAN *DUST AND SAND LOCAL LAW 2011*



Our ref: OLET-3153412
LAWE/LOCLWS/2: BR
Your ref: 3885/17



Advisory Officer
Delegated Legislation Committee
Legislative Council
PARLIAMENT HOUSE
PERTH WA 6000

Dear Sir/Madam

TOWN OF BASSENDEAN DUST AND SAND LOCAL LAW 2011

I refer to your letter of 1 May 2012 regarding the above and advise that I have discussed the matter with the Department of Local Government. According to the Department's records, it appears that the letter was received by the Minister on 29 March 2011. State-wide notice was given a day later on 30 March 2011.

Whilst it is acknowledged that the two processes should have occurred in the reverse manner, as pointed out in your letter, surely the intention of the legislation is to ensure that the Minister is advised of Council's intention to make a local law without unnecessary delay.

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Yours faithfully

Brian Reed

BRIAN REED
MANAGER DEVELOPMENT SERVICES
09 May 2012

