



THIRTY-EIGHTH PARLIAMENT

REPORT 45

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

SHIRE OF KELLERBERRIN DOGS LOCAL LAW

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

November 2011

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

Hon Jim Chown MLC
Mr Paul Miles MLA
Hon Helen Bullock MLC
Mr Andrew Waddell MLA

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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

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

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

SHIRE OF KELLERBERRIN DOGS LOCAL LAW

1 INTRODUCTION

- 1.1 The Joint Standing Committee on Delegated Legislation (**Committee**) has identified that, in its new dogs local law, the Shire of Kellerberrin (**Shire**) has not followed the mandatory procedure set out in the *Local Government Act 1995* (**Act**) for the adoption of a local law.
- 1.2 The Shire has failed to correctly follow several steps as set out in section 3.12 of the Act, which has resulted in the local law being invalidly made. The local law is therefore not authorised by the Act and offends the Committee's Term of Reference 3.6(a).
- 1.3 This information report recommends that the Executive Council recommend that the Governor repeal the *Shire of Kellerberrin Dogs Local Law*.

2 ALTERNATIVES TO DISALLOWANCE

- 2.1 The *Shire of Kellerberrin Dogs Local Law* (**Local Law**) falls within the definition of 'instrument' in Standing Order 3.7(a) of the Committee's Terms of Reference. The Shire of Kellerberrin (**Shire**) resolved to commence the process of adopting a new local law relating to dogs at its meeting on 19 April 2011 and this Local Law was published in the *Western Australian Government Gazette* (**Gazette**) on 6 July 2011.
- 2.2 The Local Law stood referred to the Committee upon gazettal and the full text of the Local Law is publicly available from the State Law Publisher's website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.
- 2.3 The Shire provided the Committee with explanatory material pursuant to the requirement in section 3.12(7) of the Act on 5 September 2011. The Committee first scrutinised the Local Law at its meeting on 19 September 2011 and resolved to proceed to recommend the disallowance of the Local Law to the Parliament.
- 2.4 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. The Committee nonetheless considers that there is still an avenue open to the Governor to remove the invalid instrument from the public record through the operation of section 3.17 of the Act.

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

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

- 3.1 The Committee has previously stated its position on the status of invalidly-made local laws and the prospect of disallowance in its Report 42: *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*.¹
- 3.2 This Local Law raises the same issues in relation to the effect of non-compliance 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 invalidly made.²
- 3.3 The Committee takes this view from long-standing advice from the State Solicitor's Office (formerly the Crown Solicitor's Office). The advice confirms that the procedure set out in section 3.12 of the Act is mandatory and a local law which does not follow that procedure in the order in which it is outlined will be invalid. That advice is attached to this report as **Appendix 1**.
- 3.4 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.³
- 3.5 It is the Committee's view that tabled instruments which have not been made by following the procedure prescribed in the Act are not excluded from that power to disallow.
- 3.6 Although the opportunity to disallow has been lost, the Committee is of the view that the Governor may still address this invalidity through the exercise of his powers in section 3.17 of the Act.

4 SCRUTINY OF THE LOCAL LAW

- 4.1 The Committee first considered the Local Law at its meeting on 19 September 2011. The Committee considered the explanatory material in the Statutory Procedures Checklist provided by the Shire and formed the view that the Local Law had been invalidly made, based on non-compliance with sections 3.12(5) and (6) of the Act.

¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 42, *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2011.

² *Ibid*, p3.

³ Section 42 of the *Interpretation Act 1984*.

- 4.2 The Committee resolved to move a notice of motion in the Legislative Council to recommend disallowance of the Local Law on 19 September 2011.
- 4.3 The Committee wrote to the Shire with its view that the Local Law had been invalidly made on 20 September 2011. The Shire responded on 27 September 2011, but did not address the issue of invalidity which the Committee raised. The Shire instead provided copies of the Local Law as published in the Gazette on 6 July 2011, a letter sent to the Department for Local Government (but addressed to the Minister) and a copy of an advertisement from a newspaper, *The Pipeline*.
- 4.4 The documents provided have confirmed the Committee's view that the Shire of Kellerberrin did not comply with the mandatory requirements of section 3.12 of the Act when making the Local Law, thus rendering it invalid.

5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW

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

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.

- 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 correctly complied with and the local law is not validly made.

Section 3.12(5) of the Act - giving a copy to the Minister for Local Government

- 5.3 Section 3.12(5) requires that:

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.

- 5.4 The Statutory Procedures Checklist provided by the Shire advised that the Local Law was published in the Gazette on 6 July 2011 and the Local Law was sent to the Minister for Local Government on 22 June 2011: that is, prior to publication in the Gazette.
- 5.5 The Committee has confirmed with the Shire that a letter was sent to the Department of Local Government on 22 June 2011, which enclosed the adopted version of the Local Law. A copy of that letter is attached to this report as **Appendix 2**.

- 5.6 It is the Committee's view that the wording of section 3.12(5) of the Act implies that a local government must give the Minister for Local Government a copy of the local law as published in the Gazette, rather than the local law which is adopted by the local government. The implication in section 3.12(5) is that a local government may still amend the version which it has adopted prior to its publication in the Gazette⁴, but that once the local law appears in the Gazette, any subsequent amendments will trigger the requirements of section 3.12 again.
- 5.7 As the process outlined in section 3.12(5) of the Act has not been followed correctly by the Shire, the Committee has formed the view that the Local Law is invalid and can be repealed.

Section 3.12(6) of the Act - giving local public notice

- 5.8 The procedure in section 3.12(6) requires that:

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.

- 5.9 The Statutory Procedures Checklist which the Shire provided to the Committee advises that local public notice was given⁵ through an advertisement in *The Pipeline*, which is the local newspaper in the Shire of Kellerberrin (published by the Kellerberrin Community Resource Centre). This advertisement appeared in *The Pipeline* on 4 July 2011: that is, two days before the Local Law's publication in the Gazette.
- 5.10 The Committee confirmed that date with the Shire and received a copy of the page in *The Pipeline* showing the date of the advertisement. This reveals that the Local Law was advertised in the newspaper before it was published in the Gazette, in contravention of the step in section 3.12(6). A copy of that advertisement is attached to this report as **Appendix 3**.

⁴ Section 3.13 of the Act limits the scope of amendments which a local government may make during the section 3.12 process to exclude amendments which will result in a "significantly different" local law from that which was first proposed.

⁵ Section 7(1) of the Act defines 'local public notice' as being "publication in a newspaper circulating generally throughout the district, exhibited to the public on a notice board at the local government's offices and exhibited to the public on a notice board at every local government library in the district".

5.11 The Committee has formed the view that the requirements of section 3.12(6) of the Act have not been followed correctly, therefore rendering the Local Law invalid and it can be repealed.

6 THE GOVERNOR’S POWER UNDER SECTION 3.17 OF THE LOCAL GOVERNMENT ACT 1995

6.1 The Governor has the power to make local laws to amend the text of, or repeal, local laws under section 3.17 of the Act:

3.17 Governor may amend or repeal local laws

(1) The Governor may make local laws to amend the text of, or repeal, a local law.

(2) Subsection (1) does not include the power to amend a local law to include in it any provision that bears no reasonable relationship to the local law as in force before the amendment.

(3) The Minister is to give a local government notice in writing of any local law that the Governor makes to amend the text of, or repeal, any of the local government’s local laws.

(4) Section 5.94 applies as if a local law made under this section by the Governor were a local law made by the local government in accordance with section 3.12.

6.2 Section 60 of the *Interpretation Act 1984* further provides that:

Where in a written law the Governor is authorised or required to do any act, matter, or thing, it shall be taken to mean that such act, matter, or thing may or shall be done by the Governor with the advice and consent of the Executive Council.

6.3 The Committee therefore recommends that the Governor, acting on the advice and consent of the Executive Council, invoke his power under section 3.17 of the Act.

7 THE COMMITTEE’S CONCLUSIONS

Term of Reference 3.6(a)

7.1 The Committee has concluded that the Local Law offends its Term of Reference 3.6(a) on the basis that two of the mandatory requirements of section 3.12 of the Act have not been complied with.

- 7.2 The Committee has therefore resolved to recommend that the Governor, on advice of the Executive Council, repeal the instrument as it is of the view that it is invalid and not authorised by the Act.

Consequences of the repeal

- 7.3 As outlined in a previous report⁶, the Committee notes that a number of benefits exist in recommending that invalid instruments be removed from the public record, which includes reducing the risk of public misinformation.
- 7.4 The Shire of Kellerberrin previously had a local law relating to dogs which was gazetted in 1974. This local law was repealed in 2006 and the Shire has been operating without a dogs local law since that time. Repealing the *Shire of Kellerberrin Dogs Local Law* will therefore result in the Shire continuing to operate without a dog local law in the district. In the Committee's view, this fact is not an impediment to recommending that the Governor repeal this invalid local law.

8 RECOMMENDATION

Recommendation 1: The Committee recommends that the Executive Council advise the Governor to invoke section 3.17 of the *Local Government Act 1995* to repeal the *Shire of Kellerberrin Dogs Local Law*.



Mr Joe Francis MLA

Chairman

3 November 2011

⁶ Refer to footnote 1.

APPENDIX 1

CROWN SOLICITOR'S ADVICE DATED 31 JANUARY 2002



CROWN SOLICITOR'S OFFICE

Dept. of Local Government
and Regional Development

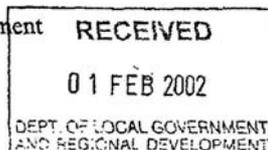
Our Ref : CSO 02/00207
Enquiries : J. Lyon
Telephone : 9264 1898

Doc. No.
File No. 427-98
Action Officer J. Fowler

Westralia Square
141 St Georges Tce
Perth, Western Australia 6000

GPO Box 883 Perth W.A. 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440, 9264 1442
Facsimile No : 9264 1111

Mr Tim Fowler
Department of Local Government and Regional Development
GPO Box R1250
PERTH WA 6001



SECTION 3.12 OF LOCAL GOVERNMENT ACT 1995 - PROCEDURE FOR MAKING LOCAL LAW - MANDATORY NATURE

I refer to your facsimile of 14 January 2002 concerning the letter to you from the Joint Standing Committee on Delegated Legislation dated 27 July 2001. D0105718
427-98 vol 1/F16

In that letter the Committee seeks advice as to whether the Department of Local Government and Regional Development considers the procedures outlined in section 3.12 of the *Local Government Act* as being "mandatory or directory". Incidentally, I should point out that I have not perused the Committee's terms of reference.

Section 3.12 of the *Local Government Act 1995* is concerned with the making of local laws. Its provisions painstakingly set out in detail the procedure to be followed by a local government when making a local law. Amongst the things to be done are the following. A summary of the purpose and effect of the proposed local law is to be read aloud at a council meeting. Statewide public notice and local public notice of the intention to make the law and a summary of its purpose and effect is to be given. In that notice submissions are to be invited. Any received are to be considered. After making the local law, Statewide public notice stating its title and summarising its purpose and effect is to be given.

Traditionally, the courts classified procedural provisions in statutes as being either "mandatory" provisions or "directory" provisions. A breach of a mandatory provision resulted in invalidity. This was not the case in relation to a directory provision.

In my letter dated 23 October 2000 to Mr Schorer (your ref: SJ 5-1, our ref: CSO 00/4607), a copy of which I enclose, I provided advice concerning the effect of a failure to obtain approval under section 6.33(3) of the *Local Government Act*. In that letter I dealt with the distinction between mandatory and directory provisions. In particular, I quoted from the High Court decision in the case of *Project Blue Sky*

Inc v Australian Broadcasting Authority [1998] 194 CLR 355. As I stated in my letter, the majority in the High Court, in respect to the mandatory/directory test, observed (at 390-391):

"A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid ... in determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"."

A consideration of the language of section 3.12 alone leaves one in no doubt that the legislature intended that failure to accord with its provisions would result in invalidity. Similar conclusions arise when one considers the scope and object of the *Local Government Act* as a whole. Its scope and object are concerned with the serious matter of providing a comprehensive system of local government throughout the State. It is of great significance that the provisions of section 3.12 deal with the grave task of making legislation; albeit that it be subsidiary legislation. In the end, in my view, it is abundantly clear that failure to comply with section 3.12 will result in invalidity of any relevant purported local law. Using the now criticised traditional term, the provisions of section 3.12 can be seen to be mandatory.

In your fax you also request advice in relation to sections 3.13 and 3.15 of the Act. Applying the considerations referred to above, the short answer, insofar as section 3.13 is concerned, is that its provisions are mandatory. In practical terms, however, it will not obviously always be easy to differentiate between significant and insignificant differences. In the case of section 3.15, I am of the strong view that a failure to comply with its provisions would not could give rise to the local law in point being invalid. This provision is directory in nature.



DEPUTY CROWN SOLICITOR

31 January 2002

Enc:

APPENDIX 2
LETTER TO THE DEPARTMENT OF LOCAL GOVERNMENT
DATED 22 JUNE 2011

Ref:DAF:KB:LLAW-12

Department of Local Government
GPO Box R1250
PERTH WA 6844

Dear Minister

Re: Adopted Dog Local Laws.

Council resolved at its meeting held on Tuesday 21 June 2011;

MIN 116/11 MOTION - Moved Cr. Lamplugh 2nd Cr. Cole

That Council:-

- ***Acknowledges the submission received and the comments contained therein during the advertising period, in accordance with Section 3.12 of the Local Government Act 1995, of the draft Dog Local Laws***
- ***Adopts the attached Shire of Kellerberrin Dog Local Laws in accordance with the provisions of the Local Government Act 1995.***

CARRIED 7/0

In accordance with Section 3.12(3)(b) of the Local Government Act 1995 please find a copy of the adopted Shire of Kellerberrin Dog Local Laws to be published in the Government Gazette.

Yours faithfully



DARREN FRIEND
Chief Executive Officer

22 June 2011

APPENDIX 3

PAGE 36 OF *THE PIPELINE*

 Shire of Kellerberrin Policy Update <i>Local Government Act 1995 (as amended) – section 5.50 (1)</i>	
<p>Public Notice is hereby given that the Shire of Kellerberrin has adopted a new Staff Rates Subsidy policy in accordance with Section 5.50 of the Local Government Act 1995.</p> <p>The policy reads:</p>	
STAFF – RATES SUBSIDY	POLICY 4.33
PURPOSE	To provide an annual payment to staff who provide their own housing.
POLICY	<p>That Council makes an annual contribution, equivalent to the minimum rate levy, on rates levied on an employee's property subject to the following criteria:-</p> <ul style="list-style-type: none"> The property must be owned in the employee's name The employee must reside in that property The property must be located within the boundaries of the Shire of Kellerberrin. The property must be owned by the employee as at 1 July each year Only one subsidy per property is payable each year (in lieu of two or more employees owning the property). A pro-rata subsidy applies to an employee working less than 38 hours per week.
DATE OF ADOPTION: 21 June 2011	AMENDED:
<p>Further enquiries can be directed to the Chief Executive Officer on (08) 9045 4006 during normal business hours.</p> <p>DARREN FRIEND <i>Chief Executive Officer</i> 24 June 2011</p>	

 Shire of Kellerberrin Dog Local Laws <i>Local Government Act 1995 (as amended) – section 3.12</i>	
<p>Public Notice is hereby given that the Shire of Kellerberrin has adopted Dog Local Laws in accordance with the Dog Act 1976 and Local Government Act 1995 at its Ordinary meeting held on 21 June 2011.</p> <p>A copy of the Dog Local Laws is available on Council's website www.kellerberrin.wa.gov.au, by emailing Katelin Bowyer on pa@kellerberrin.wa.gov.au or at the Council administration office.</p>	
<p>DARREN FRIEND <i>Chief Executive Officer</i></p> <p>Written offers addressed to the undersigned</p> <p style="text-align: center;"> Darren Friend Chief Executive Officer Shire of Kellerberrin 110 Massingham Street KELLERBERRIN WA 6410 </p>	