



THIRTY-EIGHTH PARLIAMENT

REPORT 53

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***MINDARIE REGIONAL COUNCIL STANDING
ORDERS AMENDMENT LOCAL LAW 2012***

REPORT

Presented by Mr Paul Miles MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

September 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) (until 14/08/12)	Mr Andrew Waddell MLA
Mr Paul Miles MLA (Chairman) (from 20/08/12)	Ms Janine Freeman MLA
Mr Vincent Catania MLA (from 16/08/12)	Hon Helen Bullock MLC
Hon Sally Talbot MLC (Deputy Chair)	Hon Jim Chown MLC
Hon Alyssa Hayden MLC	

Staff as at the time of this inquiry

Suzanne Veletta (Advisory Officer)	Anne Turner (Advisory Officer (Legal))
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EXECUTIVE SUMMARY AND RECOMMENDATION FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE *MINDARIE REGIONAL COUNCIL STANDING ORDERS AMENDMENT*
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 Mindarie Regional Council did not follow the correct procedure described in the Act when it made its *Mindarie Regional Council Standing Orders Amendment Local Law 2012 (Amendment Local Law)*.
- 3 Mindarie Regional Council failed to follow the sequential steps outlined in section 3.12(3)(b) of the Act, which has resulted in the Amendment Local Law being invalid. The Amendment Local Law is not authorised by the Act and therefore offends the Committee's *Term of Reference* 3.6(a).
- 4 On 16 July 2012, the Minister for Local Government stated that he agreed with the Committee's position that local laws should be disallowed where local governments have failed to comply with the local law making process.¹
- 5 The Committee recommends the House disallow Mindarie Regional Council's Amendment Local Law.
- 6 On 22 June 2012, the Director General of the Department of Local Government advised all local governments by *Circular* of the Committee's strict approach to compliance with section 3.12 of the Act.² The Director General further advised local governments that following disallowance of the:

¹ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

² Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

- *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;³ and
- *Town of Kwinana Extractive Industries Local Law 2011*,⁴

the *Statutory Procedures Checklist* has been updated to “remove any ambiguity as to the order in which the law making process must occur”.⁵ The Committee welcomes this assistance to local governments.

RECOMMENDATION

7 The Recommendation is as it appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the *Mindarie Regional Council Standing Orders Amendment Local Law 2012* be disallowed.

³ 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.

⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

⁵ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE *MINDARIE REGIONAL COUNCIL STANDING ORDERS AMENDMENT LOCAL LAW 2012*

REPORT

1 REFERRAL TO THE COMMITTEE

- 1.1 The *Mindarie Regional Council Standing Orders Amendment Local Law 2012 (Amendment Local Law)* falls within the definition of ‘Instrument’ in the *Terms of Reference* of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Amendment Local Law stands referred to the Committee upon publication in the *Western Australian Government Gazette*. Its full text is publicly available from the State Law Publisher’s website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.⁶

2 BACKGROUND

- 2.1 Mindarie Regional Council (**Mindarie**) resolved to commence the process of making an amendment to its Standing Orders Local Law at its meeting on 13 October 2011. The procedure for making a local law is outlined in section 3.12 of the *Local Government Act 1995 (Act)* and is replicated at **Appendix 1**.

3 SCRUTINY OF THE PROCEDURE FOR MAKING THE LOCAL LAW

- 3.1 The Committee first scrutinised the Amendment Local Law on 14 May 2012. Mindarie provided a *Statutory Procedures Checklist* 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 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

⁶ The Amendment Local Law was published in the *Western Australian Government Gazette* on 20 March 2012, No.45.

elements of Statewide public notice must be completed in order for the notice to be effective.

3.3 The *Statutory Procedures Checklist* for the Amendment Local Law indicated that Statewide public notice was published in *The West Australian* on 14 December 2012. However, the *Statutory Procedures Checklist* was silent as to when the Minister was given a copy of the proposed local law and a copy of the Statewide public notice. Later email communication revealed that the Minister:

- was given a copy of the proposed local law by email on 13 January 2012; but
- was never given a copy of the Statewide public notice.

3.4 In fact, the Department for Local Government advised Mindarie that it had a copy of the Statewide public notice in its possession but it was their own copy taken directly from *The West Australian*, “not one that was provided by [Mindarie] Council.”⁷

3.5 The Committee sought confirmation of the accuracy of the information in the *Statutory Procedures Checklist*. On 19 July 2012, Mindarie advised of non-compliance with section 3.12 of the Act. A copy of Mindarie’s response to the Committee’s letter regarding the *Statutory Procedures Checklist* is replicated at **Appendix 2**.

3.6 Mindarie acknowledged breaching section 3.12(3)(b) of the Act, a section that requires local laws to be made in a certain sequence. This procedural defect has resulted in the Committee forming a view that the Amendment Local Law is 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 a notification be given to the Minister after Statewide public notice has been given.

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 five 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*;⁸

⁷ Email from Mr Steven Elliott, Legislation Officer, Department of Local Government to Ms Kathleen Van Son, Administration Manager, Mindarie Regional Council, 7 May 2012.

- 45th Report: *Shire of Kellerberrin Dogs Local Law*;⁹
- 47th Report: *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;¹⁰
- 48th Report: *Town of Kwinana Extractive Industries Local Law 2011*;¹¹ and
- 51st Report: *Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*.¹²

4.2 This Amendment Local Law raises 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.¹³

⁸ 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 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*.

⁹ 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.

¹⁰ 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. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

¹¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister six days before Statewide public notice was given.

¹² Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 51, Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012. These two Instruments offended section 3.12(3)(b) of the *Local Government Act 1995* in that copies of the proposed local laws and Statewide public notices were given to the Minister one day before Statewide public notice was given contrary to the prescribed sequence.

¹³ Section 42 of the *Interpretation Act 1984*.

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.

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.¹⁴

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 Amendment Local Law is invalid and capable of disallowance.

5.5 On 16 July 2012, the Minister for Local Government stated that he agreed with the Committee's position that local laws should be disallowed where local governments have failed to comply with the local law making process.¹⁵

6 REVIEW OF SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

6.1 The Committee notes that this is the sixth occasion since September 2010 that the Committee has scrutinised a local law which has failed to follow 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

¹⁴ 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.

¹⁵ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

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- 3.12(2) in the order in which they are prescribed. This was evidenced by Mindarie Regional Council when it described its sequential errors as “*regrettable*”.¹⁶
- 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 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 In Report 51 concerning the *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*,¹⁷ the Committee again recommended 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.
- 6.6 On 16 July 2012, the Minister for Local Government advised that following disallowance of the *Town of Kwinana Extractive Industries Local Law 2011*¹⁸ and the *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*¹⁹, he will review section 3.12 of the Act “*in the future and the possibility of further amendment will be considered.*”²⁰
- 6.7 On 22 June 2012, the Director General of the Department of Local Government advised all local governments by *Circular* of the Committee’s strict approach to

¹⁶ Letter from Mr Brian Callander, Chief Executive Officer, Mindarie Regional Council, 19 July 2012, p1.

¹⁷ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 51, Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012.

¹⁸ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

¹⁹ 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. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and a then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

²⁰ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

compliance with section 3.12.²¹ The Director General further advised that following disallowance of the:

- *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;²² and
- *Town of Kwinana Extractive Industries Local Law 2011*,²³

the *Statutory Procedures Checklist* has been updated to “remove any ambiguity as to the order in which the law making process must occur”.²⁴ The Committee welcomes this assistance to local governments.

7 CONCLUSIONS

Term of Reference 3.6(a)

7.1 The Committee has concluded that the Amendment Local Law offends 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 Amendment Local Law as it is of the view it is 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.

²¹ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

²² 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. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and a then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

²³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister six days before Statewide public notice was given.

²⁴ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

7.4 Disallowance of the Amendment Local Law will have the effect of reviving sub-clause 5.9(3) of the principal *Mindarie Regional Council Standing Orders Local Law 2010*.²⁵ The Committee had formed the view that sub-clause 5.9(3) was:

- not authorised or contemplated by, and inconsistent with, the Act;
- inoperative under section 3.7 of the Act to the extent of the inconsistency; and
- void under section 43(1) of the *Interpretation Act 1984* to the extent of the inconsistency.

7.5 The Amendment Local Law was a response to an undertaking given on 13 October 2011 to repeal the offending sub-clause. The Committee expects Mindarie to recommence the process of making another amendment local law as soon as possible to address the 2011 undertaking.

8 RECOMMENDATION

Recommendation 1: The Committee recommends that the *Mindarie Regional Council Standing Orders Amendment Local Law 2012* be disallowed.



Mr Paul Miles MLA

Chairman

13 September 2012

²⁵ 5.9 *Questions during debate*: “(3) Where the presiding person considers a question asked is not succinct and to the point, but is prefaced by comment or other information, the presiding person may rule that the member has spoken on the matter and, in that event, the member must not speak again on the matter.”

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 FROM MINDARIE REGIONAL COUNCIL



Our Ref: LAW/6 : D/12/3267
Your Ref: 3887/2

16 July 2012

Mr Joe Francis MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Sir

MINDARIE REGIONAL COUNCIL STANDING ORDERS AMENDMENT LOCAL LAW 2012

Thank you for letter dated 19 June 2012, your reference 3887/2, where you request written confirmation that the Mindarie Regional Council gave State-wide public notice of the Amendment Local Law on 14 December 2011 but:

- Did not give a copy of the proposed local law to the Department of Local Government until 13 January 2012; and
- Did not give a copy of the State-wide public notice to the Minister pursuant to section 3.12(3)(b) of the *Local Government Act 1995*.

After checking our records I can confirm that the above is correct. Whilst this process failure is regrettable you can be assured that we have put in place improved processes and systems to reduce the potential for a reoccurrence of this type of administrative error in the future.

If you require any further information please do not hesitate in contacting me on 9306 6302.

Yours faithfully

BRIAN CALLANDER
CHIEF EXECUTIVE OFFICER

bc/ln

