



THIRTY-SEVENTH PARLIAMENT

REPORT 26
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION
ISSUES ARISING UNDER HEALTH LOCAL LAWS

Presented by Mr Paul Andrews MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

March 2008

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 Paul Andrews MLA (Chairman)	Mr Tony McRae MLA
Hon Ray Halligan MLC (Deputy Chairman)	Hon Barbara Scott MLC
Hon Vincent Catania MLC	Mr Tony Simpson MLA
Dr Graham Jacobs MLA	Hon Ken Travers MLC

Staff as at the time of this inquiry:

David Driscoll, Committee Clerk	Christine Kain, Advisory Officer (Legal)
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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

ISSUES ARISING UNDER HEALTH LOCAL LAWS

1 BACKGROUND

- 1.1 The purpose of this report is to bring to the attention of the Parliament a series of clauses that have come to the attention of the Joint Standing Committee on Delegated Legislation (**Committee**) following its scrutiny of several health local laws made by local governments under section 342 of the *Health Act 1911 (Act)*.¹
- 1.2 The Committee has noted that the health local laws it considered mirrored clauses found in the *City of Perth Health By-Law 1993* (repealed) and the current *City of Perth Health Local Law 2000 (Local Law)*. Clauses having a similar effect are found in the Department of Health's *Model By-laws Series "A"*.
- 1.3 Local governments' health local laws are divided into Parts dealing with different aspects of public health. The relevant clauses discussed below are found in the Parts entitled "*Offensive Trades*" and "*Lodging Houses*".

2 OFFENSIVE TRADES

Clause 162 of the Local Law

- 2.1 The Committee is of the view that clause 162 of the Local Law (**Clause**) is not authorised or contemplated by the Act.² Clause 162 states:

Occupier Includes Employee

162. Where in any clause contained in this Part a duty is imposed upon the occupier of premises in or upon which an offensive trade is carried on, the reference to the occupier shall be interpreted to include the employees of the occupier and any employee committing a breach of any provision of this Part shall be liable to the same penalties as if he were the occupier.

¹ For example, *Shire of Northampton Health Local Laws 2007*, *Shire of Goomalling Health Local Laws 2007* and *Shire of Wiluna Health Local Laws 2007*.

² See also Clause 186, *City of Perth Health By-Law 1993*. The Committee notes at this point that local governments have incorrectly substituted the term 'Section' for the term 'clause' when mirroring clause 162.

- 2.2 It appears that since 1993, a number of local governments have mirrored the Clause in their health local laws.³ This may be because the local governments have used the Local Law as a template to enact their own laws.
- 2.3 The Committee has been unable to establish how many, if any, employees have been prosecuted under the Clause.
- 2.4 The Clause is found in Part 9, Division 1 of the Local Law entitled “Offensive Trades”. This division also contains an interpretation clause and registration requirements.
- 2.5 An occupier is defined as including “*the person registered as the occupier of the premises specified in the Certificate of Registration*”.
- 2.6 Part 9, Division 2 imposes a broad range of general duties on occupiers including:
- keeping the premises clean and in a state of good repair;
 - provision of sanitary conveniences;
 - ensuring premises are free from rats and vectors;
 - painting surfaces;
 - managing and operating odours;
 - disposing of and storing offensive materials; and
 - complying with structural requirements.
- 2.7 Duties of an occupier may also include those which relate to specific kinds of premises, for example fish premises or laundries.
- 2.8 Contravention of the Local Law is an offence and a penalty may be imposed.

Clause 17 of the Department of Health’s Model By-laws Series “A”

- 2.9 Section 343 of the Act provides for the making of model local laws which may be adopted by reference. These model local laws have no effect except to the extent that they are adopted. Model local laws made under the Act are not disallowable but are relevant to the Committee’s function to the extent that health local laws may be based on the model local law.

³ See for example: *Shire of Broome Health Local Laws 2006*, *Shire of Dandaragan Health Local Laws 2005*, *Shire of GinGin Health Local Laws 2004*, *Town of Vincent Health Local Laws 2004*, *Shire of Victoria Plains Health Local Laws 2004*, *Town of Victoria Park Health Local Laws 2004*, *Shire of Bridgetown-Greenbushes Health Local Laws 2003*, *Shire of Mundaring Health Local Laws 2003*.

- 2.10 The Committee also identified the following by-law contained in the Department of Health's *Model By-laws Series "A"* as amended in 1994 which has the same effect as the Clause:

17. By-laws bind employees

Where in any by-law contained in this Part any duty is thrown upon the occupier of any offensive trade premises, the by-law shall be interpreted to include employees of any such occupier, and any such employee committing a breach of these by-laws shall be liable to the same penalties as if he were the occupier.

- 2.11 Contravention of the *Model By-laws Series "A"* is an offence and a penalty may be imposed.
- 2.12 The Committee has been unable to ascertain whether clause 17 of the Department of Health's *Model By-laws Series "A"* has been used to any significant degree in the past.

3 SOURCES OF POWER TO MAKE LOCAL LAWS REGARDING OFFENSIVE TRADES

The Act

- 3.1 Part VII of the Act makes provision for nuisances and offensive trades.
- 3.2 Part VII, Division 2 of the Act provides for offensive trades. The division:
- defines offensive trades under Schedule 2;⁴
 - sets out requirements for local government consent and registration;
 - makes it an offence to establish an offensive trade in breach of the Act; and
 - sets out certain requirements and restrictions that apply to premises where an offensive trade is carried out.
- 3.3 Section 190 of Part VII, Division 2 is a general provision which provides for local laws to be made as follows:

Local laws may be made in accordance with Part XIV to regulate the conditions on which offensive trades may be carried on in order to prevent or diminish the offensiveness of the trades and to safeguard public health.

⁴ For example: abattoirs or slaughter houses; laundries and piggeries.

- 3.4 Part XIV of the Act empowers local governments to make local laws for the purposes of carrying out the provisions of the Act.
- 3.5 Part VII, Division 3, section 199 of the Act sets out an exhaustive list of purposes for which local laws in respect of nuisances and offensive trades may be made.
- 3.6 The provisions of the Act applying to offensive trades do not provide a basis for imposing on an employee the duties imposed on an occupier of premises where offensive trades are carried out. It is the Committee's view that if the Parliament intended to create a clause that imposed liability on an employee for a range of occupier's duties, many of which the employee would be unlikely to have the capacity to effect, it would have done so expressly in the Act.

The Common Law

- 3.7 A number of the duties imposed on an occupier by the Local Law involve matters which may be out of an employee's control such as maintaining premises in good repair, eradicating rodents, provision of sanitary facilities, managing odours and emissions and providing appropriate storage.
- 3.8 Responsibility for an offence has been discussed in the following terms:⁵

It is a general principle that a defendant is responsible for an offence only if he or she personally performed the conduct proscribed and did so with the requisite mental element.

The principle of personal responsibility applies to all offences apart from the exceptions where vicarious liability is imposed by statute or at common law.

Vicarious liability is a form of absolute liability which is inconsistent with two fundamental principles of criminal responsibility: first, criminal liability requires personal conduct; secondly, criminal liability requires personal blameworthiness.

- 3.9 Imposing vicarious liability usually involves an employer becoming vicariously liable for the offences of an employee:⁶

Where offences have been taken to impose vicarious liability, there have been three main underlying policy reasons: the perceived need to impose liability on those in control of an enterprise; the difficulties that can arise in proving complicity or personal fault on the part of an

⁵ <http://tla.thomson.com.au/tla/reultDetailed.jsp?id=9.2.152> (viewed on 15 November 2007).

⁶ Ibid.

employer or principal; and the undesirability of "scapegoating" low-level employees or agents.

- 3.10 Vicarious liability normally applies, where an employer is vicariously liable for the actions of an employee. The Committee is not aware of any other situation where an employee is made liable for the actions of an employer or, as in this case, an occupier.
- 3.11 The Committee has reached the following conclusions regarding clause 162 of the Local Law and clause 17 of *Model By-laws Series "A"*.
- Making an employee liable for breaches of a local law that require actions that are outside the power of the employee is contrary to common law principles.
 - The clauses are not authorised or contemplated by the Act.
 - Imposing liability on an employee for a broad range of duties which would normally fall within the ambit of an employer (in this instance, occupier) is a matter which is more appropriately dealt with in the Act.
- 3.12 The Committee is of the view that, to the extent clauses of health local laws mirror the defective Local Law and *Model By-laws Series "A"*, those clauses are also not authorised or contemplated by the Act.
- 3.13 The Committee has requested on three occasions that local governments provide an undertaking to delete the offending Clause from their health local laws. The local governments in question have provided those undertakings.

4 LODGING HOUSES

- 4.1 Part V, Division 2, section 158 of the Act empowers local governments to make local laws in respect of lodging houses.
- 4.2 Both *Model By-laws Series "A"* as amended in 1994⁷ and the Local Law⁸ set out the restrictions on what materials may be kept by a lodger or resident of a lodging house.
- 4.3 The Committee has identified the following clause in both the Department of Health's *Model By-laws Series "A"* as amended in 1994⁹ and the Local Law:¹⁰

Responsibilities of lodgers and residents

A lodger or resident shall not —

⁷ Clause 31.

⁸ Clause 177.

⁹ Clause 31.

¹⁰ Clause 177.

...

(b) keep or store in or on the lodging-house any goods or materials that are inflammable, obnoxious or offensive;

....

4.4 A person who contravenes the Local Law commits an offence and is liable to a penalty.

4.5 The term ‘obnoxious’ is not used in the Act.

4.6 The Committee notes with regard to other terms used in the clause that the terms ‘offensive’ and ‘inflammable’ are referred to in the Act. ‘Offensive’ is defined in the Act as follows:

*“offensive” includes noxious;*¹¹

4.7 ‘Inflammable’ is not defined in the Act. However, the Committee considers its meaning to be easily ascertainable.

4.8 The Committee was unable to locate the use of the term ‘obnoxious’ in any other Western Australian Act or regulation.

4.9 The Macquarie Concise Dictionary (1998) defines ‘obnoxious’ as:

*objectionable; offensive; odious ... [L: exposed to harm].*¹²

4.10 The Macquarie Concise Dictionary (1998) defines ‘odious’ as:

... .1. deserving of or exciting hatred; hateful or detestable. 2. highly offensive; disgusting... .

4.11 ‘Obnoxious’ is also defined in the Australian Oxford Dictionary (1999) as:

offensive; objectionable: disliked.

4.12 An online search using Google and the search term ‘define obnoxious’ provides the following result:¹³

objectionable: causing disapproval or protest; a vulgar and objectionable person.

¹¹ Section 3, *Health Act 1911*.

¹² The Macquarie Concise Dictionary (1998) uses L as an abbreviation for Latin.

¹³ http://www.google.com.au/search?hl=en&cr=countryAU&def=en&q=define:obnoxious&sa=X&oi=glossary_definition&ct=title (viewed on 3 January 2007).

4.13 Two local governments have indicated to the Committee that they did not consider a definition was required given that the normal meaning of the word was found in the dictionary and a court would refer to a dictionary to clarify the meaning if necessary.¹⁴

4.14 The Committee acknowledges the argument presented by the local governments. However, it is concerned with the impact of the Local Law on the resident or lodger prior to the matter being disputed in a court.

4.15 One local government also indicated that, generally speaking, in a lodging context ‘obnoxious’ would mean:¹⁵

*“liable to harm”, or “exposed to something unpleasant or harmful”,
or “odiously or disgustingly objectionable”:* highly offensive.

4.16 The Committee notes that the definitions indicate a range of interpretations of the word ‘obnoxious’.

4.17 The Committee is concerned that without a prescribed definition the term ‘obnoxious’ is open to subjective interpretation and its meaning is not sufficiently clear for:

- providing consistency in the application and enforcement of clause 8.3.9(b) of the Local Law; and
- ensuring that any individual who may be affected by the clause is able to clearly discern its meaning.

4.18 The Committee is of the view that the *Health Act 1911* and the *Local Government Act 1995* contemplate that local laws will be fair and reasonable. Currently a resident or lodger in a boarding house cannot clearly discern from the face of the local law what materials they are not permitted to keep in the lodging house in which they are residing. Reference to a dictionary or website does not provide a singular definition of the term.

4.19 The Committee considers that, if the term ‘obnoxious’ is used in the local law, a definition should be prescribed.

4.20 The Committee has requested on three occasions that local governments either delete that term ‘obnoxious’ or prescribe a definition for the term within their health local law. To date two local governments have provided those undertakings.

¹⁴ Letter from Environmental Health Officer/Building Supervisor, Shire of Northampton, 31 October 2007. Letter from the Chief Executive Officer, Shire of Wiluna, 27 November 2007.

¹⁵ Letter from the Chief Executive Officer, Shire of Wiluna, 27 November 2007.

5 CONCLUSION

- 5.1 The Committee notes that the previous Joint Standing Committee on Delegated Legislation (1987-2001) accepted the advice provided by the State Solicitor's Office¹⁶ to the Minister for Health that the relevant by-laws in the *Model By-laws Series "A"* even if amended, could not be adopted, as they no longer have standing under section 343 of the Act.¹⁷ The wording of the clauses of the *Model By-laws Series "A"* and of the *City of Perth Health Local Law 2000* continue to be used by local governments, often by reference to earlier local laws of other local governments.
- 5.2 The Committee notes that the Minister for Health has on previous occasions, where a defect has been found to occur in a number of local laws, remedied the identified defect by invoking section 343B of the Act. This provides the Governor with a power to amend the text of, or repeal a local law.

Recommendation 1: The Committee recommends that the Minister for Health invoke section 343B of the *Health Act 1911* to effect an amendment deleting, from all health local laws, the clauses listed below:

“(i) Occupier Includes Employee

Where in any clause contained in this Part a duty is imposed upon the occupier of premises in or upon which an offensive trade is carried on, the reference to the occupier shall be interpreted to include the employees of the occupier and any employee committing a breach of any provision of this Part shall be liable to the same penalties as if he were the occupier.

(ii) By-laws bind employees

Where in any by-law contained in this Part any duty is thrown upon the occupier of any offensive trade premises, the by-law shall be interpreted to include employees of any such occupier, and any such employee committing a breach of these by-laws shall be liable to the same penalties as if he were the occupier.”

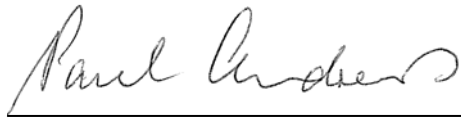
¹⁶ Formerly, the Crown Solicitor's Office.

¹⁷ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 2, *Model By-Laws Series "A" and Health Local Laws Made By Local Governments Under the Health Act 1911*, December 2001, p14.

Recommendation 2: The Committee recommends that the Minister for Health invoke section 343B of the *Health Act 1911* to effect an amendment prescribing for all health local laws a definition of the word “obnoxious”.

OR

That the Minister for Health invoke section 343B of the *Health Act 1911* to effect an amendment deleting the word “obnoxious” from all health local laws.



**Mr Paul Andrews MLA
Chairman**

20 March 2008