



Government of **Western Australia**  
Department of **Environment Regulation**

GUIDELINES

# Guide to drafting waste local laws

*For use by local governments and the Western  
Australian Local Government Association*



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# Introduction

Following the disallowance by the Western Australian Parliament (Parliament) of two waste local laws<sup>1</sup>, DER reviewed and considered the general content of such laws submitted to it pursuant to the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act).

To date, the majority of waste local laws submitted to the department have been based upon waste provisions in local governments' health local laws; these were made under the *Health Act 1911*. The review conducted by DER identified some common issues in the drafting of waste local laws including; excessively prescriptive laws, the un-authorised delegation of legislative power, the use of archaic terminology and laws being beyond the scope of the legislation.

This document is intended to provide general guidance to local governments in managing some of these issues; it does not and is not intended to provide detailed drafting advice.

## Role of DER

In order to be validly made, a waste local law requires the consent of the Director General of DER (referred to in the WARR Act as 'the CEO'). The CEO in deciding to provide consent has regard to whether the local law is for the purposes specified in section 64 of the WARR Act or generally for carrying into effect the provisions of Part 6 (which relates to waste services) (see section 61(1)).

The power for local governments to make waste local laws is found under section 61 of the WARR Act, and not the *Local Government Act 1995* (LG Act). If made, to be valid such laws must be done so in accordance with the procedural requirements set out in Part 3 Division 2 Subdivision 2 of the LG Act.

Where prior guidance from the Joint Standing Committee on Delegated Legislation (JSCDL) regarding the validity of waste local laws is relevant and sufficiently clear, DER may provide comments regarding this. DER may also choose to provide comments regarding other issues, some of which are identified in this document. However, it is not DER's role to provide local governments with detailed drafting advice or advice as to the validity of proposed waste local laws.

The responsibility for ensuring that a local law is valid, and will not be the subject of a disallowance recommendation to Parliament by the JSCDL, rests with the local government. The CEO's consent under the WARR Act to a local law is not a guarantee against such a recommendation being made to Parliament by the JSCDL. DER notes that the JSCDL's terms of reference when considering a local law are broad (see 6.6(a) of Schedule 1 of the Legislative Council Standing Orders, at Attachment 1).

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<sup>1</sup> *City of Gosnells Waste Local Law 2011* and *Shire of Derby/West Kimberley Waste Services Local Law 2011*.

For further information, refer to the Joint Standing Committee on Delegated Legislation (JSCDL), *City of Gosnells Waste Local Law 2011*, Transcript of Evidence Monday, 31 October 2011 (Transcript) and JSCDL Report 46 *City of Gosnells Waste Local Law 2011* and *Shire of Derby/West Kimberley Waste Services Local Law 2011* (Report 46), both of which are available at:

[www.parliament.wa.gov.au/Parliament/commit.nsf/\(ReportsAndEvidence\)/1BCB7CE6149A18E648257952000F8611?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/1BCB7CE6149A18E648257952000F8611?opendocument)



# Guidance

## Unauthorised delegation of legislative power

Legal principles do not permit waste local laws to be drafted to further delegate to a specified person or body the *legislative* power that has been delegated to the local government under section 61(1) of the WARR Act. However, if a power, function or discretion under a waste local law is granted to a third party (e.g. an authorised person), this would be valid if of an *administrative* nature; an important indicator is whether the discretion is circumscribed by guidelines within which that person must act<sup>2</sup>.

In DER's view, an example of an unauthorised delegation of legislative power is a waste local law which prohibits an owner or occupier from removing local government waste (as defined under the WARR Act) from a premises, but which also provides the local government with the power or discretion to authorise such persons to remove waste, if it is not available for removal at regular periods or is of such a nature or quantity to be unsuitable for removal by the government or its contractor.

## Excessive prescription

The JSCDL raised concerns with Parliament in relation to the now disallowed *City of Gosnells Waste Local Law 2011* and *Shire of Derby/West Kimberley Waste Services Local Law 2011* that excessively prescriptive clauses, “are not reasonable and proportionate to the empowering legislation and are therefore not authorised by the empowering provisions...”<sup>3</sup>. The JSCDL holds the view that local law provisions should be drafted to reflect the objectives of the law, or be more outcomes based, rather than being prescriptive activity-based provisions that unnecessarily capture an unreasonably broad scope of conduct<sup>4</sup>.

## Duplicating other laws

It is unnecessary to include clauses in a waste local law that duplicate offences that are covered in other Acts. Some Acts that have been duplicated in the past include the *Litter Act 1979* and *Litter Regulations 1981*, *Bush Fires Act 1954*, *Health (Asbestos) Regulations 1992*, *Dangerous Goods Safety Act (2004)*, *Radiation Safety Act 1975* and the *Criminal Code*.

## Offences and penalties

The JSCDL has stated it has a preference for waste local laws prescribing infringement notice offences and having modified penalties, rather than providing a maximum penalty of \$5,000 and daily penalty of \$500 per contravention of a clause (as is permitted under sections 64(3) and (4) of the WARR Act), which gives the Court a discretion to impose the maximum penalty upon conviction<sup>5</sup>.

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<sup>2</sup> *Godkin v Newman* [1928] NZLR 593; Pearce and Argument, *Delegated Legislation in Australia* (3<sup>rd</sup> ed, 2005) p 295.

<sup>3</sup> Report 46, paragraph 7.7 and pages 15 to 18.

<sup>4</sup> See the Transcript for an in-depth discussion of this issue.

<sup>5</sup> See paragraph 4.12 of Report 46 Report and also pages 14 to 16 of the Transcript.



## Use of ‘Landfill Waste Classification and Waste Definitions 1996’

When defining items in a waste local law use the definitions for various types of waste set out in the “Landfill Waste Classification and Waste Definitions 1996 (as amended December 2009)”<sup>6</sup>.

### Terminology

The terminology used in a local law should not be archaic, subjective or ambiguous.

### Legal advice

Due to the legal complexities involved in drafting local laws, and DER’s approach as identified in this paper, DER recommends that prior to submission to the department independent legal advice is obtained during the drafting of such laws.

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<sup>6</sup> Available from <http://www.wasteauthority.wa.gov.au/media/files/documents/landfillwasteclassificationandwastedefinitions1996.pdf>