



Government of **Western Australia**
Department of **Local Government**

Local Laws

Local Government Operational Guidelines – Number 16 November 2011

Local Laws

1. Introduction

The Department of Local Government assists and monitors the process of making local laws in Western Australia. The Department works closely with the Western Australian Local Government Association (WALGA), Local Government Managers Australia (LGMA) and the Parliamentary Joint Standing Committee on Delegated Legislation in coordinating advice to local governments on the making of good local laws.

This operational guideline covers many issues on local laws including:

- Assessing the need for a local law;
- The process for making a local law, from policy decisions and council meetings to final publication;
- The process for reviewing local laws;
- The impact of National Competition Policy;
- The role of the Department, Joint Standing Committee on Delegated Legislation and other bodies which scrutinise local laws;
- The content of local laws; and
- Common problems with local laws.

The Parliament's Joint Standing Committee on Delegated Legislation has prepared numerous reports commenting on the standard of local government local laws. Its most recent Report No 16 and other Reports are available on Parliament's website at www.parliament.wa.gov.au.

2. Overview

Section 3.5 of the *Local Government Act 1995* ("the Act") provides the power for local governments to make local laws to help perform their functions.

Section 3.7 of the Act states that a local law is inoperative to the extent that it is inconsistent with the Act or any other written law.

3. Procedure for Making Local Laws

In making a local law, a local government must follow the steps which are set out below and in section 3.12 of the Act (see Appendix 1 which provides a flow chart of the steps for making a local law):

- At a council meeting the person presiding is to give notice to the council meeting of the purpose and effect of the proposed local law;
- Statewide and local public notice is to be given stating that:
 1. The local government proposes to make the local law (a summary of the purpose and effect of the local law is included in the notice);
 2. A copy of the proposed local law can be inspected or obtained from the local government; and
 3. Submissions about the proposed local law may be made to the local government, before a date given in the notice, being not being less than six weeks after the publication of the notice (Note: in calculating the six week period, add extra days for both publishing day and closing day, and when closing day falls on a public holiday, Saturday or Sunday).
- As soon as the notice is given, a copy of the proposed local law, together with the public notice and the National Competition Policy (NCP) form, must be given to both the Minister for Local Government and to any other Minister administering the Act under which the local law is made;
- A copy of the proposed local law is to be provided to any person requesting it;
- After the last day for submissions, the local government must consider any submissions and may, by an absolute majority, proceed with the local law as proposed or make alterations that are not significantly different from what was first proposed;

- The adopted local law is published in the Government Gazette;
- After the local law is published, provide a signed and sealed copy of the adopted local law to the Minister(s).
- Another local public notice is given:
 1. Stating the title of the local law;
 2. Summarising its purpose and effect;
 3. Specifying the date on which it comes into operation; and
 4. Advising that copies of the local law may be inspected or obtained from the office of the local government.
- Documents (Explanatory Memorandum, checklist etc) are sent to the Parliament's Joint Standing Committee on Delegated Legislation.

4. Resources

Local law information is accessible from the Department's website at www.dlg.wa.gov.au. The Local Law Register is a database of all local law titles made by each local government. It has a search facility to allow local governments to look for gazettal information.

For information on the Joint Standing Committee on Delegated Legislation, visit the Parliamentary website. The website also contains a list of committee reports and the undertakings requested from local governments regarding local laws.

For additional assistance on local law-making processes, please contact the Department's Local Laws Helpline on (08) 6552 1494 or email legislation@dlg.wa.gov.au. Whilst information and suggestions will be offered, local governments will at times need to obtain independent legal advice on specific issues.

WALGA also operates a local laws service to its member local governments. It has published a series of Model Local Laws, which were originally developed in conjunction with the Department.

5. Adoption Procedures

5.1 Public Consultation

Section 3.12(3)(a)(iii) of the Act requires local governments to advertise their proposed local laws and provide the public with a statutory period of 'not less than six weeks after the notice is given' in which to lodge submissions. For the purposes of a written law, the *Interpretation Act 1984* provides that the computation of time does not include the first and last day of the event.

When calculating the closing date on which submissions can be made, there must be a minimum of 42 clear days to meet the requirement of "not less than six weeks". Remember to exclude both the first day of advertising the public notice and the last day on which submissions can be lodged, a requirement of s.61(1)(f) of the *Interpretation Act 1984*. Also, the last day on which submissions can be lodged cannot fall on a Saturday, Sunday or public holiday, but rather the next possible working day. It is far better to provide a longer public consultation period than to risk invalidating the local law.

The following is an example of calculating the minimum public consultation period. If your notice is to be advertised in the paper on Thursday 16 August 2012, exclude this day from the six-week period. Then add 42 days to the date on which the notice is to be published. The 42nd day falls on Thursday 27 September 2012. The next day shall be the latest day by which submissions must be lodged, that is, Friday 28 September 2012.

Similarly, ensure that all the required information is included in the public notice. The requirements are set out at s.3.12(3)(a)(i)–(iii) of the Act for the first public notice (proposed local law) and at s.3.12(6)(a)(c) of the Act for the final public notice (adoption of local law).

The Department monitors local law advertisements to check for compliance with the requirements of the Act. Should statutory requirements not be met, local governments will be advised to re-advertise to ensure that the local law is made within power (see Appendix 2 for examples of notices).

5.2 Submitting Copy of Proposed Local Law to Minister (Department)

Section 3.12(3)(b) of the Act requires local governments to give the Minister for Local Government (and another Minister, where applicable) an electronic copy and a hard copy of the proposed local law. This first copy should be exactly as it is intended to be published (gazettal format) in the Government Gazette so that assistance can be given to eliminate problems before the adoption process is substantially advanced and the local government unnecessarily expends its resources.

If your local government intends to adopt local laws by reference (that is, adopt local laws already published by another local government), you need to supply a copy of the abridged version (in gazettal format) as well as the full text version of the local law. Checking the full text will assist to ensure that your local government will not be adopting clauses that are not pertinent to your district.

If your local government is substantially adopting a WALGA model, it would be appreciated if you would indicate by underlining or highlighting in colour, or by similar means, the variations being undertaken. If you are preparing an amendment local law, please also supply the consolidated version of the local law, that is, the full text of the law with the amendments incorporated.

Where another Minister administers other written laws (e.g., *Health Act 1911*, *Bush Fires Act 1954* and *Agriculture & Related Resources Protection Act 1976*), a copy of the proposed local law must be provided to that Minister in addition to the copy for the Minister for Local Government and Regional Development (see ss.3.12(3)(b) and 3.12(5) of the Act).

The Health Act 1911 also requires the approval of the Executive Director Public Health prior to adopting Health local laws under that Act.

5.3 Submitting National Competition Policy Review Forms

A National Competition Policy (NCP) review involves looking at a local law to see if any clauses (including amendments to principal local laws) restrict competition and if so, that the restrictions can be justified in terms of overall public benefit outweighing the disadvantages. It should also be

established that the objectives of the proposed local law can only be achieved by the restrictions to competition.

Completed NCP forms should be submitted at the same time as the proposed local laws are submitted to the Minister. Your local government needs to make a statement that competition policy restrictions, where applicable, have been assessed during the preparation of the proposed local laws. Please note that the NCP report should be available for inspection and comment by the public along with the proposed local law.

The list of local laws that are exempt from NCP review are available from the Department's website via reference to local government, local laws, overview, key circulars, Circular No. 916 or Circular No. 824 for a blank NCP review form.

5.4 Drafting Standards and Terms

(i) Drafting Style

There are two principle styles used by local governments when drafting local laws. One is the style used in the WALGA local laws manual and the other is the style used by Government for Acts and Regulations. Either style is acceptable.

(ii) Drafting Errors

Some local governments prepare proposed local laws with problems such as:

- grammatical and typographical errors;
- inconsistent formatting;
- inconsequential numbering of clauses and sub-clauses;
- self-referencing clauses;
- proposing to make a subsidiary law under the wrong governing Act (e.g., a Dog Local Law made under the *Local Government Act 1995* instead of the *Dog Act 1976*);
- providing incorrect publication dates of earlier gazetted principal and amendment local laws, and By-laws, when listing them for repeal;
- the inclusion of unreasonable wording;
- not specifying what is being deleted, or repealed;

- providing inaccurate titles of obsolete local laws and By-laws for repeal;
- errors of law (e.g., incorrect impounding provisions; incorrect appeal rights);
- erroneous dates in the preamble of the draft proposed local law – the date of resolution of intention to commence the process for making a proposed local law is not required in the preamble.

Care needs to be taken to ensure that these problems do not occur. Remember that it is a cost to your local government when amendment local laws are made to correct errors in the gazetted laws that could have been avoided at the drafting stage.

(iii) 'Enabling Act' or 'Head of Power'

The Enabling Act or Head of Power refers to the Act such as the *Local Government Act 1995* under which the legislation is made. The name of the Act must appear first in the local law, followed by the name of the local government and then the title of the local law.

(iv) Preamble

The drafting of the preamble depends on the stage at which the local law is at in the local law making process. For example, when the first copy of the proposed local law is sent to the Department (s 3.12(3)(b)), the date in the preamble is left blank as follows:

Under the powers conferred by the *Local Government Act 1995* and under all other powers, the Council of the Shire of Treetops resolved on2006 to make the Shire of Treetops Repeal Local Law 2006.

A couple of months later, when the council decides to proceed and make the local law (s3.12(4)), the date of that particular meeting (e.g. 28 May 2006) will be inserted into the preamble as follows and will be in the final copy of the local law that is sent to the State Law Publisher for printing and to the Department (Minister) (s3.12(5)):

Under the powers conferred by the *Local Government Act 1995* and under all other powers, the Council of the Shire of Treetops resolved on 28 May 2006 to make the Shire of Treetops Repeal Local Law 2006.

5.5 Correcting

Once an error has been published, it cannot be corrected by simply publishing a correction notice in the Gazette. A correction notice can only be used where the State Law Publisher has made a printing error or the error is something different to what the local government submitted for publishing. Any other changes to the published law, however small, must be made by way of a new proposed amendment local law, requiring fresh and full compliance with all of the steps of the process in s3.12 of the Act.

5.6 Gazettal by Reference

If your local government is adopting the text of another local government's local law, be careful to check the accuracy and details of the law you will be adopting. Several local governments using this method have had to make amendment local laws to rectify the transmission of errors from the preceding gazettals. It is important to ensure that you are not adopting outdated text of another local government's local law.

Another problem is adopting another local government's local laws by reference where that local government has already adopted the local law by reference. This creates a "doubling" effect that is confusing to the reader and often unintended errors occur.

Local governments should confirm that the gazettal date of the local law being adopted by reference is the date the law was actually published in the Gazette and not the date it was passed by that council. Otherwise your local law will attempt to adopt a law that does not legally exist.

If you want to adopt both the text of another local government's local law and a later amendment (possibly a correction) to this law, you need to specify both dates in the preamble.

Local governments are advised against the practice of adopting gazettals by reference to a local law "as amended in the future". Under s3.8 of the Act, this practice may apply for the adoption of model local laws (s3.9 of the Act) but not for adopting another local government's local laws. Also, by including their future amendments, you would incorporate another local government's decisions about their local law into your local law without your council having any input, consultation or (often) knowledge of these decisions whenever they occur in the future.

5.7 Amending (s3.12 of the Act), Repealing (s3.12 of the Act), or Reviewing (s3.16 of the Act)

Some local governments are not aware that when amending or repealing a local law, this needs to be done in accordance with s3.12 of the Act, which is the same procedure for 'making' a local law. This is because amendment or repeal local laws are new local laws themselves and must follow the full statutory process to be made within power.

Section 3.16 of the Act requires that all of the local laws of local governments must be reviewed within an eight year period after their commencement to determine if they should remain unchanged or be repealed or amended.

The eight-year period is taken to be from either when the local law commenced or when the last review of the local law (using s3.16 of the Act) was completed.

Section 3.16 of the Act provides for reviewing the currency and suitability of gazetted local laws – this section cannot be used for amending or repealing legislation. When the outcome of the review finds that it is necessary to change an outdated aspect of the law or that the subsidiary legislation has become defunct or obsolete, the local government must then commence the process outlined in s3.12 of the Act to implement any changes.

5.8 Time Limits

While the Act does not expressly prescribe a timeframe in which the procedural requirements for making local laws are to be completed, the procedures should be undertaken with 'all convenient speed' in line with the *Interpretation Act 1984*. It is the Department's understanding that local law procedures that take more than a year could be subject to questions of legal validity. Accordingly, if the local law process has had delays of more than a year, then the procedure for making a local law should be restarted.

5.9 Adoption and Gazettal of Local Law

Section 3.12(4) and (5) requires a local government:

- to consider any submissions received about the proposed local law;
- by absolute majority to make the local law that is not significantly different from what was proposed;
- to publish the local law in the Government Gazette; and
- to give a copy (second copy) to the Minister (LGRD) and any other Minister administering the Act under which the local law was made.

6. Role of the Department

The Department examines the proposed local laws on behalf of the Minister. This is done when, pursuant to s3.12(3)(b) of the Act, local governments provide a copy of the proposed local law and a copy of the notice to the Minister. The Department gives specific consideration to the following:

- Whether the proposal is adopted under the correct Act of Parliament;
- Whether the proposal is in conflict with the Act and any other law;
- National Competition Policy issues;
- Whether an application for the extension of a local government boundary, to enable a local law to apply outside its district, has received approval by the Governor;
- Matters raised previously by the Joint Standing Committee on Delegated Legislation; and
- State Government policy issues.

The Department works closely with WALGA and the Joint Standing Committee on Delegated Legislation of the Parliament to ensure that the proposed content of the local laws will be generally acceptable to all concerned.

7. Role of the Joint Standing Committee on Delegated Legislation

The Joint Standing Committee on Delegated Legislation is a joint committee of the Parliament of Western Australia comprising eight members with equal representation from the Legislative Council and the Legislative Assembly.

The Committee has been delegated by Parliament the task of scrutinising subsidiary legislation in accordance with its terms of reference. These terms of reference were set in June 2001. The terms of reference and copies of all reports tabled by the Committee (and former Committees) can be downloaded from the Parliament of Western Australia website at www.parliament.wa.gov.au. The Committee can be contacted by email on delleg@parliament.wa.gov.au or by telephoning the Legislative Council Committee Office on (08) 9222 7300.

Local laws are subsidiary legislation that are capable of disallowance by either House of Parliament under section 42 of the *Interpretation Act 1984*. Disallowance is the device by which the Parliament maintains control of the power it has delegated to local governments, State Departments and other agencies of Government to make subsidiary legislation. In the case of local governments, this power is granted by the Act and other particular Acts including the *Health Act 1911* and the *Dog Act 1976*.

Scrutiny by the Committee and disallowance are accountability mechanisms to guard against the making of local laws that are either unlawful by going beyond the power that is delegated or contravening one of the Committee's terms of reference.

The other accountability mechanisms impacting on local laws are:

- the local community, who under the Act are required to be consulted on proposed local laws;
- the Minister for Local Government, who is charged with administering the Department of Local Government which monitors local law making;
- the Government, which can request the Governor to make regulations or local laws under the Act that repeal or amend local laws or prevent certain local laws being made; and
- the courts, which can pronounce on the validity of local laws.

Because it is Parliament that delegates the power to make local laws, the Parliament can, by disallowance, ensure that the power is not abused or exercised inappropriately. The Committee, through being empowered by Parliament to scrutinise local laws on its behalf, can recommend to Parliament that a local law be disallowed if it contravenes one of its terms of reference.

The Committee recommends disallowance as a last resort. Such action will usually only occur in circumstances where the local government does not satisfy the concerns of the Committee. In the majority of cases to date, where the Committee has expressed concerns about a local law, the relevant local government has provided the Committee with a satisfactory written undertaking to address the concerns by amending or repealing parts of the local law.

7.1 Explanatory Memoranda Directions

The Committee's Explanatory Memoranda Directions (see Ministerial Circular No. 04-2010) set out the information to be sent directly to the Committee (not the Department) as soon as a local government has gazetted a local law. After completing the procedural steps from sections 3.12(1) to 3.12(6) of the *Local Government Act 1995*, section 3.12(7) requires local governments to provide explanatory material for each local law gazetted. Preparing an Explanatory Memorandum forms part of the process of making a local law (s3.12(7) of the Act).

Ministerial Circular 04-2010 provides examples and a checklist of the material to send, which must occur within 10 working days of the Gazette publication date.

7.2 Committee's Address

Hard copies of the completed Explanatory Memorandum and other required materials must be sent to:

Committee Clerk
Joint Standing Committee on Delegated Legislation
Legislative Council Committee Office
GPO Box A11
PERTH WA 6837

and electronic copies can be sent to delleg@parliament.wa.gov.au, however if a submission is emailed an electronic signature is required.

For queries about submitting the explanatory material, the Legislative Council Committee can be contacted on (08) 9222 7300.

7.3 Explanatory Memorandum must be signed

The Committee requires the Explanatory Memorandum to be signed by both the CEO and the President/Mayor. The reason is that the President/Mayor is the representative of the legislative arm of the local government that enacted the local law and the CEO is the head of the executive arm of local government, responsible for administering the local law.

7.4 Late Responses

It is essential to respond to the Committee's requests within the advised timeframes. The Committee works under strict time limits governed by the *Interpretation Act 1984* and the Standing Orders of the Legislative Council. In cases where the time limit set by the Committee for a response cannot be met, local government officers should immediately contact Committee staff to determine whether an extension of time can be granted. In circumstances where an extension of time is not possible, the Committee recommends that the council convene a special meeting under Part 5, Division 2 of the Act to resolve the matter and inform the Committee of the council's decision by the requested date.

Submitting material late or failing to address the Committee's concerns may result in the Committee recommending disallowance of the local law.

8. Other Common Local Laws Problems

8.1 Adoption of Policies

The Joint Standing Committee will not approve local laws which attempt to adopt policies and make them enforceable. Adopting policies and making them enforceable is often done in planning schemes, however that is done under the *Planning and Development Act 2005*, not the Act.

The Joint Standing Committee position is that the powers of the Act do not permit local laws to empower a local government to adopt internal policies as laws other than by inclusion of the matter in a local law (eg policies for advertising signs or codes of conduct). Attempting to adopt policies in local laws and make them enforceable is considered an attempt to avoid the process in s.3.12 of the Act and the scrutiny of Parliament.

The section 3.12 procedure is mandatory and must be followed in chronological order. Failure to do this will render the local law invalid and will likely result in the Joint Standing Committee recommending the law for disallowance.

8.2 Extending Boundaries

Extending a local government boundary is usually only a procedure for coastal local governments that need to apply bathing or boating laws beyond the boundary of the coast.

Those local governments should note that it is necessary to obtain approval from the Governor under s.3.6 of the Act to any extension of their boundary, prior to proceeding to make a local law.

8.3 Ouster Clauses

In the past, a number of local governments have attempted to create local laws that limit or abolish a person's common law right to claim damages from or initiate other legal proceedings against a local government.

On all occasions, the Joint Standing Committee has not approved such local laws and its position remains that such local laws are not permissible.

8.4 Shifting Onus of Proof

As with the ouster clauses described in section 8.3 of this guideline, some local governments have attempted to create local laws that reverse the onus of proof for prosecution purposes.

Similarly, on all occasions the Joint Standing Committee has not approved such local laws and its position remains that such local laws are not permissible.

The exception to the above is parking local laws, under which under the Act an owner of a vehicle is deemed to be liable for parking infringements unless they can prove otherwise.

8.5 Powers of Entry

A local government's power of entry to rectify nuisances is contained in Schedules 3.1 and 3.2 of the Act.

Some local governments have sought to extend their power of entry to rectify nuisances beyond Schedules 3.1 and 3.2 by attempting to create local laws to that effect. The Act does not provide for this extension of powers and any attempt to do so will be unenforceable.

8.6 Signs

Some local governments are attempting to deal with signage on private land through their signs local laws, whereas the correct place for dealing with this issue is under their town planning scheme. Signs local laws should only deal with the issue of signage on local government property.

In relation to election signage, the Joint Standing Committee requires that signs local laws do not absolutely restrict the placement of signs as attempting to do so contravenes the Australian Commonwealth Constitution. However, local laws placing conditions on the erection of election signs and restricting their location are permissible.

8.7 Codes of Conduct

Many local governments have recently considered making local laws to provide a code of conduct for their council members. The Joint Standing Committee recently reported that such local laws could be made only under particular provisions of an Act of Parliament and would be invalid unless made under such laws.

8.8 Impounding Goods

Under the *Local Government (Functions and General) Regulations 1996*, local governments are restricted to impounding goods involved in a contravention of a local law or a regulation where it occurs in a public place and the goods either are an obstruction, present a hazard or are placed in a location contrary to the law.

The regulations also apply to the impounding of animals, whether they are on a private or public place.

Local governments should ensure that their local laws do not conflict with the impounding provisions of the regulations because to the extent that they do conflict, they will be held unenforceable.

8.9 Indemnities

Similar to attempting to make local laws that limit or abolish a person's common law right to claim damages against a local government, some local governments have proposed to make local laws which would indemnify the local government against claims for damages.

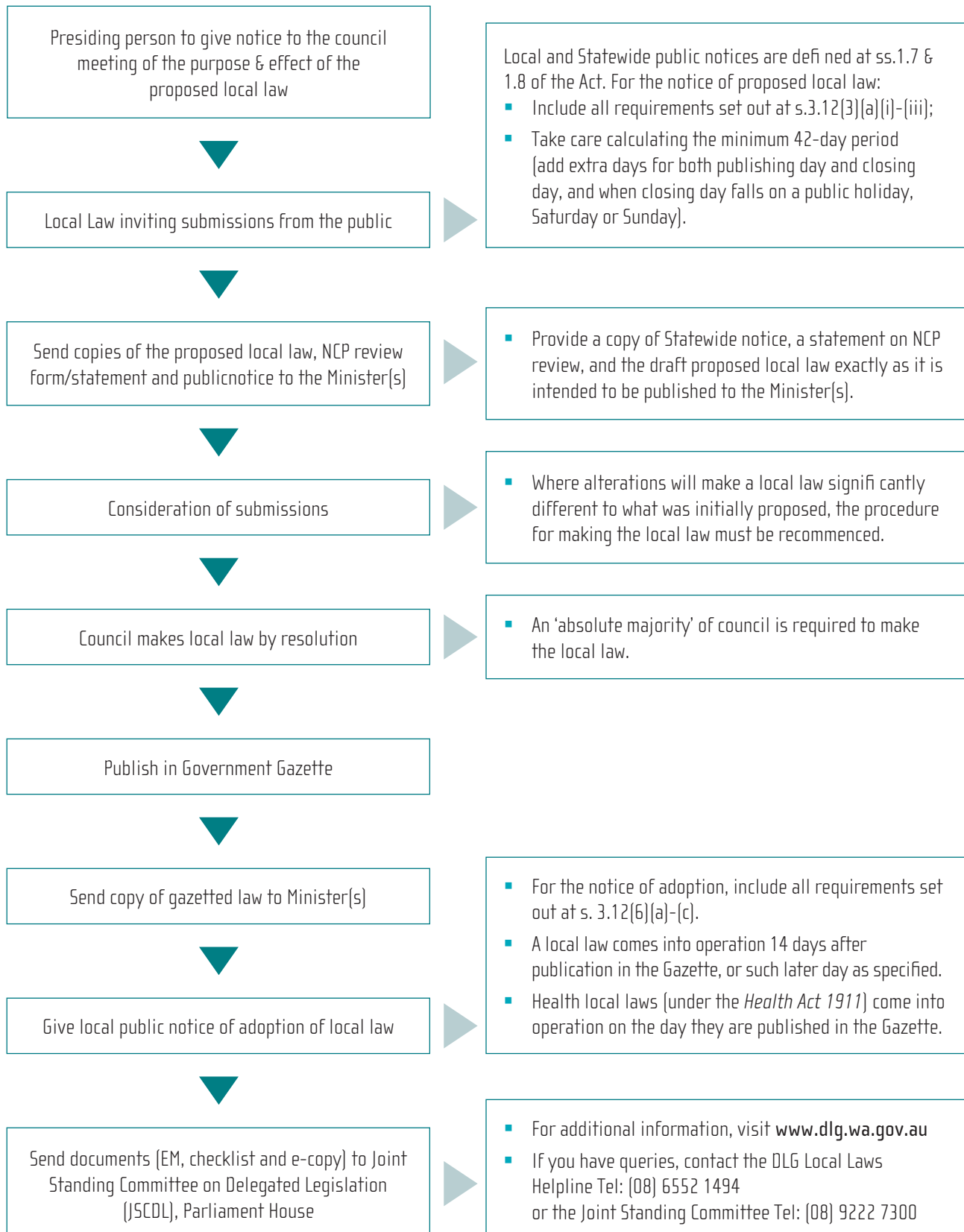
Local laws are not capable of providing such an indemnity as damages are awarded by the Courts subject to the *Civil Liability Act 2002*.

8.10 Determinations

This is a device used in the WALGA model local government property local law to specify the times and places that certain contraventions in local laws apply. These council decisions are not contained in the actual local law.

The Parliament's Delegated Legislation Committee does not support such devices in principle. However, it has advised that it will accept this practice only for this type of local law for practical reasons. Local governments will need to ensure that they do not use this practice to any greater extent than this.

Flow Chart of Local Law-Making Process



Example of Public Notice

Appendix 2

(Under Section 3.12 of the *Local Government Act 1995*)

FIRST NOTICE

Refer to section 3.12(3) and (3a) –
Statewide and local public notice

LOCAL GOVERNMENT ACT 1995

Shire of Treetops Proposed Local Government Property Local Law

The Shire of Treetops proposes to make a local law relating to local government property.

The **purpose** of this local law is to regulate the care, control and management of property of the local government.

The **effect** of this local law is to control the use of local government property; it provides that some activities are permitted only under a permit or under a determination, and that some activities are restricted or prohibited. Offences are created for inappropriate behaviour in or on local government property.

A **copy** of the proposed local law may be inspected at or obtained from the Shire's office at 2 Treetops Avenue, Community Vale between 8.00am and 4.30pm Monday to Friday, and at any public library within the Shire of Treetops during normal opening hours.

Submissions about the proposed local law may be made to the Chief Executive Officer, Shire of Treetops, PO Box 101, Community Vale WA 6484 by **Friday 2 September 2011**.

Joe Smith
CHIEF EXECUTIVE OFFICER

FINAL NOTICE

Refer to section 3.12(6) –
local public notice

LOCAL GOVERNMENT ACT 1995

Shire of Treetops Adoption of Local Government Property Local Law

The Shire of Treetops has resolved to adopt the ***Shire of Treetops Local Government Property Local Law 2006***.

The **purpose** of this local law is to regulate the care, control and management of property of the local government.

The **effect** of this local law is to control the use of local government property; it provides that some activities are permitted only under a permit or under a determination, and that some activities are restricted or prohibited. Offences are created for inappropriate behaviour in or on local government property.

A **copy** of the local law may be inspected at or obtained from the Shire's office at 2 Treetops Avenue, Community Vale between 8.00am and 4.30pm Monday to Friday, and at any public library within the Shire of Treetops during normal opening hours.

This local law was gazetted on 14 October 2006 and will come into operation on **28 October 2011**.

Joe Smith
CHIEF EXECUTIVE OFFICER

FURTHER INFORMATION

For more information about this and other guidelines, contact the Advice and Support Branch of the Department of Local Government:

Tel: (08) 6552 1500

Fax: (08) 6552 1555

Freecall: 1800 620 511 (Country Only)

Local Government Advisory Hotline

Tel: 1300 762 511

Email: lghotline@dlg.wa.gov.au

Opening Hours: 8.30am - 5.00pm, Monday to Friday

These guidelines are also available on the Department's website at www.dlg.wa.gov.au

ABOUT THE GUIDELINE SERIES

This document and others in the series are intended as a guide to good practice and should not be taken as a compliance requirement. The content is based on Departmental officers' knowledge, understanding, observation of, and appropriate consultation on contemporary good practice in local government. Guidelines may also involve the Department's views on the intent and interpretation of relevant legislation.

All guidelines are subject to review, amendment and re-publishing as required. Therefore, comments on any aspect of the guideline are welcome. Advice of methods of improvement in the area of the guideline topic that can be reported to other local governments will be especially beneficial.